Form No. 7

San Francisco
Law Library

No. 76896

Presented by

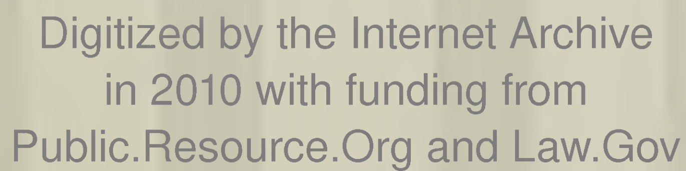
....

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

WILCOX & CO.


Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

http://www.archive.org/details/govuscourtsca9briefs1233

1233

No. 3374

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HAWAIIAN PINEAPPLE COMPANY, LIMITED (a corporation),

Appellant,

vs.

MASAMARI SAITO and LIBBY, MCNEILL & LIBBY OF HONOLULU, LIMITED (a corporation),

Appellees.

BRIEF FOR APPELLANT.

PETERS & SMITH,
FREAR, PROSSER, ANDERSON & MARX,
Honolulu, T. H.,
Solicitors for Appellant.

EDWARD HOHFELD,
San Francisco, California,
Of Counsel.

FILED

No. 3374

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HAWAIIAN PINEAPPLE COMPANY, LIMITED (a corporation),

Appellant,

vs.

MASAMARI SAITO and LIBBY, MCNEILL & LIBBY OF HONOLULU, LIMITED (a corporation),

Appellees.

BRIEF FOR APPELLANT.

Note.—Figures herein in parentheses refer to transcript pages. Appellant Hawaiian Pineapple Company, Limited, and appellees Masamari Saito and Libby, McNeill & Libby of Honolulu, Limited, will be referred to as Pineapple Company, Saito, and Libby Company, respectively, for brevity.

I.

Abstract of the Case.

This is a suit in equity by the complainant and appellant, Pineapple Company, against Saito and the Libby Company, commenced in the Circuit Court of Hawaii, for an injunction to restrain Saito

from selling to the Libby Company, and the Libby Company from buying from Saito, merchantable Smooth Cayenne pineapples grown or owned or controlled by Saito. Upon return of the order to show cause issued upon the filing of the bill of complaint, a temporary writ of injunction was issued, which, after trial, was made perpetual.

The essential facts as disclosed by the pleadings and evidence are as follows:

Appellee Saito is a Japanese planter of pineapples on the Island of Oahu, in the Territory of Hawaii, and on May 18, 1916, which is the date of the agreement between Saito and the Pineapple Company which forms the subject-matter of this suit, was the owner of two leasehold interests in lands belonging to the Oahu Railway & Land Co. and which were located at Leilehua, on the Island of Oahu. These leases were dated respectively February 3, 1913, and January 2, 1915; and upon these demised lands Saito grew Smooth Cayenne pineapples.

Subsequent to the execution of said agreement with the Pineapple Company, Saito acquired two other leases of lands, also located at Leilehua and also belonging to the Oahu Railway & Land Co. These two leases were dated respectively July 1, 1916, and August 10, 1916, the former embracing real property described as Lots 9, 10 and 11, and the latter real property described as Lots 1, 2, 3 and 4.

On April 1, 1918, Saito entered into a contract with appellee, the Libby Company, for the sale to it of all of the Smooth Cayenne pineapples grown by him upon the lands covered by these last two leases dated respectively July 1, 1916, and August 10, 1916, and in the fulfillment of this contract Saito began to deliver pineapples grown by him on these lands.

Prior to the execution of the contract between Saito and the Libby Company, Saito had been selling to the Pineapple Company all of the pineapples grown by him both on the lands covered by his first two leases owned by him on May 18, 1916 (the date of his contract with the Pineapple Company) as well as all the pineapples grown by him on the lands covered by the two subsequent leases of July 1, 1916, and August 10, 1916.

The Pineapple Company under these circumstances commenced the present suit to restrain Saito from selling or delivering to the Libby Company, and to restrain the Libby Company from buying or receiving from Saito, any of these pineapples, upon the ground that the pineapples grown by Saito on his two subsequently acquired leases were covered by his prior agreement with the Pineapple Company dated May 18, 1916, and the Pineapple Company also sought an accounting against Saito and the Libby Company on account of pineapples already sold and delivered by Saito to the Libby Company.

All pineapples raised on the Island of Oahu during the year 1918 were contracted for and it was

impossible to buy any quantity of Smooth Cayenne pineapples on the island. The Pineapple Company at this time did not have sufficient pineapples contracted for to fill its orders and had searched the island for uncontracted pineapples, without success. Furthermore, the United States had applied to the Pineapple Company as well as to other canners for a certain per cent of their pack, in order to supply the needs of the army; in consequence the Pineapple Company needed every pineapple it had under contract to fill government requirements as well as its other orders. All pineapple canners were on the search for any pineapples which could be purchased, but were unsuccessful in their search. These and other facts were alleged in the complaint and established by evidence to the satisfaction of both the trial court and the Supreme Court of Hawaii, and they both held that the case was a proper one for injunctive relief if the pineapples grown on the subsequently acquired lands were covered by said agreement dated May 18, 1916, between the Pineapple Company and Saito.

The trial court granted a temporary injunction, and after trial a permanent injunction, restraining Saito from selling or delivering to the Libby Company, and restraining the latter from buying or receiving from Saito, any of Saito's pineapples grown on the subsequently acquired lands. The trial judge held that the contract so clearly by its language covered pineapples grown on subsequently

acquired lands, that Saito and the Libby Company "to avoid the issuance of an injunction have got to show the court that the contract does not mean what it says."

On appeal the Supreme Court, while conceding that the case was a proper one for equitable jurisdiction, held that it was "clear" that the intention of the parties to the contract was that the pineapples grown on subsequently acquired lands were not included in the contract between the Pineapple Company and Saito.

While the two courts thus agree that there is no ambiguity in the language of the contract, they have come to diametrically opposite conclusions as to the meaning of the contract. It is probable that in such a case the truth of the matter lies along the middle path, and that in fact there is an ambiguity in the contract which must be resolved by a construction in the light of the well-established principles applicable to the case.

The portions of the agreement between the Pineapple Company and Saito which contain the mutual obligations of the Pineapple Company and Saito respectively and which contain the ambiguity in question are the following:

> "The Pineapple Company agrees that during the term of four years beginning May 1, 1916, and ending April 30, 1920, it will handle and buy under the conditions as hereinafter detailed, and with such exceptions as are hereinafter stated, all the merchantable Smooth Cayenne pineapples that may be grown by the

> Planter on his present holdings at Leilehua, or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu.
>
> "The Planter agrees that he will deliver to the Pineapple Company under the terms and conditions and with the exceptions hereinafter contained, all the merchantable Smooth Cayenne pineapples he may grow at Leilehua, or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu, during the term stated."

The ambiguity admittedly lies in the first paragraph quoted above. The Pineapple Company contends, and the trial court found, that with the implied and understood portions thereof supplied, the first paragraph should read as follows:

> "The Pineapple Company agrees that during the term of four years * * * it will * * * buy * * * all * * * pineapples that may be grown by the Planter on his present holdings at Leilehua, or (that may be grown by the Planter) elsewhere on the Island of Oahu, or (pineapples) that he may own or control on the Island of Oahu."

Saito and the Libby Company contend, and the Supreme Court of Hawaii have found, that with the implied portions of this paragraph supplied, it should read as follows:

> "The Pineapple Company agrees that during the term of four years * * * it will * * * buy * * * all * * * pineapples that may be grown by the Planter on his present holdings at Leilehua, or (on his present holdings) elsewhere on the Island of Oahu, or (on his present holdings) that he may own or control on the Island of Oahu."

And the Supreme Court in consonance with such construction of the agreement dissolved the injunction and dismissed the bill.

Within the time allowed by law appellant filed its petition for order allowing appeal from said decree, accompanied by specifications of errors, which petition was granted and this appeal allowed by appropriate order (209).

Thereafter the Chief Justice prepared and caused to be filed a statement of the evidence in the case (247).

There are the following points in the case:

1. That the contract dated May 18, 1916, between the Pineapple Company and Saito was by the parties intended to include pineapples grown, owned or controlled by Saito on the Island of Oahu during the term of said contract, whether on lands held by Saito at the time of the contract or subsequently acquired.

This construction of the contract will be sought to be established by the appellant Pineapple Company by reference to the folowing facts:

(a) The intrinsic evidence contained within the body of the contract itself.

(b) The extrinsic evidence showing the circumstances under which the contract was made, including the situation of the subject matter of the contract and the parties to it.

(c) The extrinsic evidence showing the practical construction of the contract by the parties thereto.

2. That the case is a proper one for the equitable jurisdiction of the court.

II.

Assignment of Errors.

For convenience of the court appellant here prints the assignment of errors served and filed with the petition for allowance of appeal upon which appellant here relies, and the questions above stated arose.

1. The court erred in not holding that by the terms of the contract between M. Saito and Hawaiian Pineapple Company, Limited, dated May 18, 1916, said M. Saito is under obligation to sell to the complainant, for the term stated in said contract, all of the merchantable Smooth Cayenne pineapples that may be grown by the said M. Saito upon the Island of Oahu on land which was leased by said M. Saito after the said contract dated May 18, 1916, was entered into.

2. The court erred in finding that by the terms of said contract between Hawaiian Pineapple Company, Limited, and M. Saito dated May 18, 1916, said M. Saito is under no obligation to sell to the complainant, for the term stated in said contract, any or all of the merchantable Smooth Cayenne

pineapples that may (166) be grown by M. Saito upon the Island of Oahu on land which was leased by said M. Saito after said contract dated May 18, 1916, was entered into.

3. The court erred in not holding that by the terms of the contract between Hawaiian Pineapple Company, Limited, and M. Saito, dated May 18, 1916, said M. Saito is under obligation to sell to complainant for the term stated in said contract all of the merchantable Smooth Cayenne pineapples grown by the said M. Saito upon Lots Nos. 9, 10 and 11 leased by said M. Saito from the Oahu Railway and Land Company under lease dated July 1, 1916.

4. The court erred in finding that by the terms of said contract between Hawaiian Pineapple Company, Limited, and M. Saito, dated May 18, 1916, said M. Saito is under no obligation to sell to the complainant, for the term stated in said contract, any or all of the merchantable Smooth Cayenne pineapples grown by the said M. Saito upon Lots Nos. 9, 10 and 11 leased by said M. Saito from the Oahu Railway & Land Company under lease dated July 1, 1916.

5. The court erred in not holding that by the terms of the contract between Hawaiian Pineapple Company, Limited, and M. Saito, dated May 18, 1916, said M. Saito is under obligation, for the term stated in said contract, to sell to complainant all of the merchantable Smooth Cayenne pineapples grown by the said M. Saito upon Lots Nos. 1, 2, 3

and 4 leased by said M. Saito from the Oahu Railway and Land Company under lease dated August 10, 1916.

6. The court erred in finding that by the terms of said contract between Hawaiian Pineapple Company, Limited, and M. Saito, dated May 18, 1916, said M. Saito is under no obligation, for the term stated in said contract, to sell to the complainant any or all of the merchantable Smooth Cayenne pineapples grown by the said M. Saito upon Lots Nos. 1, 2, 3 and 4 leased by said M. Saito (167) from the Oahu Railway and Land Company under lease dated August 10, 1916.

7. The court erred in not holding that by the terms of the contract between M. Saito and Hawaiian Pineapple Company, Limited, dated May 18, 1916, said M. Saito is under obligation to sell to the complainant all of the merchantable Smooth Cayenne pineapples owned or controlled by said M. Saito upon the Island of Oahu during the term stated in said contract.

8. The court erred in finding that by the terms of said contract between M. Saito and Hawaiian Pineapple Company, Limited, dated May 18, 1916, said Saito is under no obligation to sell to the complainant all of the merchantable Smooth Cayenne pineapples which he may own or control on the Island of Oahu during the term stated in said contract.

9. The court erred in finding that there was no contemporaneous construction of the contract

which showed that Saito and the Hawaiian Pineapple Company, Limited, intended by said contract dated May 18, 1916, to obligate the Hawaiian Pineapple Company, Limited, to buy and M. Saito to sell all pineapples which might be raised, owned or controlled by the said Saito upon the Island of Oahu at any time during the continuance of said contract.

10. The court erred in not finding that there was a contemporaneous construction of said contract showing that M. Saito and the Hawaiian Pineapple Company, Limited, intended by their contract to obligate the Hawaiian Pineapple Company, Limited, to buy and M. Saito to sell all pineapples which might be raised, owned or controlled by the said Saito on the Island of Oahu at any time during the continuance of said contract. (168)

11. The court erred in finding the issues on the construction of the contract for the respondents.

12. The court erred in not finding the issues upon the construction of the contract for the petitioner.

13. The court erred in decreeing that the decree appealed from should be vacated and set aside, the injunction dissolved and the complainant's bill dismissed.

14. The court erred in not decreeing that the decree appealed from be affirmed.

15. The decree is against the manifest weight of evidence.

16. The decree is contrary to law.

III.

Argument.

First Point.

THE LANGUAGE OF THE CONTRACT TAKEN AS A WHOLE SHOWS THAT IT WAS THE INTENT OF THE PARTIES THAT THERE SHOULD BE INCLUDED THEREIN PINEAPPLES GROWN, OWNED OR CONTROLLED BY SAITO ON THE ISLAND OF OAHU DURING THE TERM OF SAID CONTRACT, NOT ONLY ON LANDS HELD BY SAITO AT THE DATE OF THE CONTRACT BUT ALSO ON LANDS ACQUIRED SUBSEQUENT THERETO.

The first paragraph of the agreement between the Pineapple Company and Saito quoted above (ante p. 5) may be graphically represented thus:

> "The Pineapple Company agrees during the term of said contract to buy all
> 'pineapples
> that may be *grown* by the Planter
> on his present holdings at Leilehua,
> or
> elsewhere on the Island of Oahu,
> or
> that he may *own* or *control* on the Island of Oahu.' "

According to this interpretation the Pineapple Company agrees to buy from Saito, the Planter, all the *pineapples* either *grown* or *owned* or *controlled* by the Planter in the Island of Oahu—a natural and meaningful interpretation which gives force and effect to every word and clause therein and which, as we shall subsequently see, brings it into perfect har-

mony with the subsequent obligation of the Planter and with other portions of the contract to which attention will hereafter be called.

The interpretation of the contract as contended for by Saito and the Libby Company and as made by the Supreme Court may similarly be represented thus:

> "The Pineapple Company agrees during the term of said agreement to ~~sell~~ buy all
> 'pineapples
> that may be grown by the Planter
> on his present holdings
> or { at Leilehua, elsewhere on the Island of Oahu,
> or { that he may own or control
> on the Island of Oahu.' "

According to the above interpretation suggested by the appellees, the Pineapple Company agreed to buy all pineapples grown by the Planter on his *present holdings* whether located *at Leilehua* or *elsewhere* on the Island of Oahu or *whether owned or controlled by him in the Island of Oahu*—an interpretation which practically nullifies and makes redundant the words "that he may own or control in the Island of Oahu", since if the words "at Leilehua, or elsewhere in the Island of Oahu" modify the words "present holdings", then the words "that he may own or control in the Island of Oahu" add nothing to that already expressed previously by the

words "present holdings at Leilehua, or elsewhere in the Island of Oahu". Certainly his "present holdings at Leilehua or elsewhere on the Island of Oahu" must be either *owned* or *controlled* by him, and therefore the addition of this last clause would merely create a redundancy. It is, however, one of the canons of construction that

> "no word in a contract is to be treated as a redundancy if any meaning reasonable and consistent with other parts can be given to it". (13 C. J. 535.)

It must be conceded by both sides that if the obligation of the Pineapple Company be taken by itself, both of the above interpretations are *possible* ones. It must also be conceded by both sides that neither of the above interpretations is a *necessary* one. Different minds in reading the paragraph will take, some one view, and some the other view, of its meaning. It is practically impossible to tell with entire assurance which interpretation is the correct one if this paragraph of the agreement be considered solely by itself. Appellant ventures to submit that the comma (,) after "Leilehua", and before the words "or elsewhere on the Island of Oahu", tends to support appellant's view more than it does that of appellee. If the words "or elsewhere on the Island of Oahu", modify the words "present holdings", it would, we think, be better grammatical construction to omit the comma so as to bring into close association the words "Leilehua or elsewhere".

But this matter of punctuation is not, of course, a controlling circumstance; it is simply one of the several considerations to which the attention of the court will be attracted, all tending to sustain the construction of the agreement contended for by appellant.

It is of course one of the cardinal rules of construction that

> "a contract must be construed as a whole, and that the intention of the parties is to be collected from the entire instrument and not from detached portions, in being necessary to consider all of its parts in order to determine the meaning of any particular part as well as of the whole". (13 C. J., 525, and cases cited.)

In obedience to this principle we pass to the following paragraph of the agreement which contains the obligation of the Planter whereby he agrees to sell, during the term of the agreement, all

"pineapples
- that he may *grow*
  - at Leilehua,
  - or elsewhere on the Island of Oahu,
- or that he may *own* or *control* on the Island of Oahu,

during the term stated."

The Supreme Court furthermore held (186 to 187) that the obligation of the Planter to sell all of his pineapples grown, owned or controlled on the Island of Oahu was unambiguous and if considered without reference to the ambiguous obligation of the Pineapple Company as set forth in the preced-

ing paragraph of the contract would clearly necessitate a holding that the Planter was obligated to furnish pineapples to the Pineapple Company, both from holdings held by him at the time of the contract, as well as from lands subsequently acquired by him.

In substance the Planter has agreed to sell all pineapples either *grown,* or *owned,* or *controlled,* by him on the Island of Oahu, and this is the only possible interpretation of this sentence. It will be noted that this sentence in all of its parts balances with, and dovetails into, the obligation of the Pineapple Company as interpreted above by appellant. Indeed if we add to the words, "at Leilehua", in the obligation of the Planter, the words "on his present holdings", we have not changed or made ambiguous the obligation of the Planter in any respect and thereby we have in the obligation of the Planter substantially the exact duplicate of the language contained in the agreement of the Pineapple Company, with the exception that the words "on his present holdings" follow instead of precede the words "at Leilehua". Or, conversely, if in the obligation of the Pineapple Company we transpose the words "on his present holdings", which appear before the words "at Leilehua", and place them after these words, no ambiguity any longer exists in the obligation of the Pineapple Company, and its obligation and that of the Planter are identical in meaning and free of all ambiguity, and means just what appellant contends for.

> "It is permissible to transpose words in a contract in order to make its meaning more clear and to carry out the intent of the parties." (13 C. J., 535, and cases cited.)

We have thus seen that by wholly unambiguous language the Planter agreed to sell to the Pineapple Company all the pineapples either *grown* by him, or *owned,* or *controlled* by him, in the Island of Oahu, the evident intent being that the Planter was to obligate himself to sell all of his pineapples, however acquired, on the Island of Oahu, to the Pineapple Company, and that the Pineapple Company was likewise reciprocally to be bound to buy all of the pineapples *grown, owned* or *controlled* by the Planter on the Island of Oahu.

Subsequent portions of the contract where similar language is used reinforce most strongly this idea and compel the construction contended for by appellant. Thus the parties agree:

> "It is further mutually agreed by the parties hereto, that in the event of destruction by fire or convulsion of nature, of the cannery of the Pineapple Company, or strike of the employees in said cannery, all *obligation on the part of the Pineapple Company* under the terms of this instrument to accept and pay for any *pineapples grown, owned* or *controlled* by the Planter, thereby lapses; and the said Planter hereby waives all claim on the said Pineapple Company to accept and pay for any pineapples in the event of such destruction * * * until such time as the said Pineapple Company shall have notified in writing the Planter that it has again prepared itself to receive and handle such pineapples." (30)

Again:

> "It is further mutually agreed that in case of the existence in the Territory of Hawaii of a state of war, the *obligation on the part of said Pineapple Company* under the terms of this instrument to accept and pay for *pineapples grown, owned* or *controlled* by the Planter may at the option of the Pineapple Company be suspended for such period as such state of war renders it impossible or impracticable for said Pineapple Company to conduct its business, it being understood that in the case of a partial cessation of canning operations owing to such state of war, it will be the intent of the Pineapple Company to save and handle as great a portion of the pineapples of the Planter as possible." (30-31)

and again

> "It is further mutually agreed that in case the supply of tin cans of the Pineapple Company is shut off or exhausted from causes beyond the control of the said Pineapple Company the *obligation of the Pineapple Company* to accept and pay for any *pineapples grown, owned,* or *controlled* by the Planter thereby lapses for such period of time as such supply of tin cans is shut off in whole or in part, it being understood that in case of a partial shortage of said cans, the Pineapple Company will accept and pay for as much fruit as possible." (31)

The Supreme Court held (186) that there is *no obligation on the part of the Pineapple Company* to buy any "pineapples owned or controlled" by the Planter, but only pineapples "grown" by him, the Supreme Court holding that all of the clauses following the words, "present holdings," in the

obligation of the Pineapple Company modify and refer to "present holdings" and not to "pineapples." But the attention of the Supreme Court was not called to, and it did not consider or discuss, the three paragraphs of the contract last quoted, which *ipsissimis verbis* refer to "the obligation on the part of the Pineapple Company," to buy "any *pineapples grown, owned,* or *controlled* by the Planter." Since the only obligation of the Pineapple Company is contained in the alleged ambiguous paragraph first quoted in this brief (page 5), and since in the three paragraphs appearing thereafter in said contract and which have been quoted above, this obligation of the Pineapple Company has been clearly and unambiguously defined to be that of buying all the "*pineapples grown, owned,* or *controlled* by the Planter," it would seem to follow that this definition of the obligation of the Pineapple Company by the parties themselves furnishes a complete, as well as the best, interpretation of the Pineapple Company's obligation which can possibly be furnished. If so, then the interpretation suggested by the appellees, and adopted by the Supreme Court, must be entirely repudiated.

The Supreme Court furthermore in its opinion in support of its holding that the contract did not include pineapples grown on subsequently acquired lands referred to the provision contained therein requiring the Planter to "deliver said fruit f. o. b. railroad cars at Leilehua, Oahu," the court saying (187-8);

> "Assume that subsequently to the date of the contract Saito acquired land at Waimanalo or at some other locality remote from and inaccessible to Leilehua, and that upon this land he grew and produced pineapples. In that event if the construction urged by complainant is to be adopted Saito would be required to deliver these pineapples to the company f. o. b. cars at Leilehua at $14.00 per ton, when, from the geographical and physical conditions prevailing, which are within the common knowledge of all, the expense of transportation alone would far exceed that amount."

There are several answers to this objection.

In the first place, in the agreement of April 1, 1918, between the Libby Company and Saito, respecting the purchase and sale of the pineapples claimed by appellant from Saito on future acquired lands, the Libby Company has agreed to take delivery from Saito of all Smooth Cayenne pineapples

> "that may be grown by the said Planter on the Planter's said holdings, or elsewhere in the City and County of Honolulu, Territory of Hawaii, or that the Planter may own or control in the City and County of Honolulu."

This is substantially the same language as is used in the contract between the Pineapple Company and Saito and the contract between the Libby Company and Saito is replete with passages showing that the Libby Company contracted for all of Saito's pineapples wherever *grown, owned* or *controlled* in the City and County of Honolulu, and whether on lands then owned by him or subsequently

acquired. (86) Yet in this contract the Libby Company is required to deliver lug boxes to the Planter at Leilehua, and the Planter is required to "deliver the said fruit f. o. b. cars Leilehua, Oahu." Evidently the same practical reasons existing in the case of the Pineapple Company and Saito, existed when the contract between the Libby Company and Saito was executed. At any rate the Libby Company is estopped from urging the paragraph in the contract of the Pineapple Company with Saito for delivery of the pineapples at Leilehua when it has incorporated under similar conditions the same provision in its own contract.

In the second place, for practical purposes, although the Island of Oahu is the only geographical limitation upon the location of pineapples that the Planter may grow or own or control, accessibility to the railroad cars at Leilehua, at which lug boxes are to be furnished by the Pineapple Company, and at which the pineapples are to be delivered by the Planter, practically restricts the general language of the contract in respect to the geographic location of the pineapples which the Planter may *grow,* or *own,* or *control* on the Island of Oahu. Accessibility to the railroad cars at Leilehua is hence a factor. For these reasons the Planter will not, as a practical matter, grow pineapples at "Waimanalo or some other locality remote from and inaccessible to Leilehua." As the Supreme Court suggested, (187) Saito might do so; for similar reasons he might do so under his present contract with the

Libby Company, but such a course of action by Mr. Saito is merely hypothetical, conjectural, and highly improbable, without any relation to the actual facts of the case, and as a practical matter Mr. Saito could not possibly be prejudiced by this provision of the contract with the Libby Company any more than he evidently thought he could be when he entered into his contract with the Pineapple Company.

In the third place, it would be a natural assumption that the Planter, for purposes of economy, would not spread out beyond lands already accessible to the shipping point employed by him for shipping pineapples that he grew on his original holdings. A canner such as the Pineapple Company would, of course, make contracts for the supplying to it of pineapples, only with growers who already had some *present holdings.* This would form the center and nucleus for the contract, and the language of the contract would be adapted to meet the situation in view of such *present holdings.* Hence the uniform form of contract (229-236), which left a blank (229) to designate the Planter's "present holdings," and a blank (230) to designate the delivery point nearest his present holdings. This applies equally to pineapples that the Planter might "own or control" as well as to those which he might "grow." It would be a natural assumption that a man's business activity would be employed in and around the same place where he had his original holdings and no doubt his home, as was

the case of Saito. Pineapples that the Planter might own or control would be pineapples that he might secure by purchase or otherwise than by planting, and have such an interest in that he was able to dictate their disposition, hence such pineapples as he might own or control were always deliverable at the same place in and about which he would be engaged in growing pineapples.

The Supreme Court laid considerable stress upon a provision of the contract in respect to the place of furnishing lug boxes and delivery of fruit, and put, as we have seen, the hypothetical case of the unreasonableness of a contract in respect to pineapples grown by Saito at Waimanalo or some other locality remote from and inaccessible to Leilehua. The author of the Supreme Court's opinion, however, did not appreciate the effect of holding that the contract applied to "present holdings elsewhere on the Island of Oahu." Let us assume that Saito had holdings at Waimanalo at the time of the execution of the contract, and subsequently planted pines thereon. Would it not be his plain duty under his covenant to deliver fruit to the railroad cars at Leilehua, to haul his fruit from Waimanalo to that shipping point? Can there be any question about that? Unreasonableness, to be a test, must be such a condition of affairs as would indicate that the contingency would not have been in the minds of the parties when they contracted, but according to the theory of appellees, sustained by the decision of the Supreme Court, the parties did have in mind

"present holdings elsewhere on the Island of Oahu" than his holdings at Leilehua, which would include, if they existed, present holdings at Waimanalo, and hence Saito under his own theory of the case, knew, or must have known, that he was bound under this contract (as interpreted by him) to deliver to appellant at the railroad cars at Leilehua, all pines that he might grow on such present holdings at Waimanalo.

There is no objection to contracting parties confining the general terms of a contract by provisions controlling the fulfillment of those terms. The impracticability of the Planter's growing pines on lands subsequently acquired at Waimanalo or any other locality remote from or inaccessible to Leilehua, or purchasing or controlling pineapples in a similar locality, no doubt appealed to both, and in the preparation by the Pineapple Company of the uniform contract it was calculated in advance that the place of delivery of fruit by its practical operation would control the general covenants in respect to pines grown by the Planter "elsewhere on the Island of Oahu" than on his original holdings, or pineapples owned or controlled by the Planter elsewhere than in or about the stipulated place of delivery. Perhaps the Pineapple Company did not want Saito to roam all over the island, either in the growing, or in the purchase, or in the control of pineapples, and left the shipping point to control the radius of his activity. Moreover, it would be relatively just as much a hardship for the can-

nery to deliver lug boxes at remote points, as it would be for the Planter to make delivery there of his fruit. *In short, the Supreme Court looked to the form of the contract and not to its substance.* The provision simply means that it was in the minds of both parties that the Planter should be confined in respect to future acquired lands for growing pines, or becoming otherwise interested in pines to the extent of owning or controlling them, to the same general location as his original holdings. It is not the case of an oversight on the part of either party in failing to provide delivery points elsewhere on the Island of Oahu than at Leilehua. To fix them in advance was, of course, impracticable. To allow the Planter to plant anywhere and everywhere, or to own or control pines anywhere and everywhere, was likewise impracticable, especially in view of the fact that it is a matter of common knowledge that the line of the railroad is short, and that Leilehua, Wahiawa, and Pupukea are the only districts on the island in which pineapples are grown and which are tapped by the railroad. Therefore the covenant as to the delivery of fruit at Leilehua is perfectly reasonable. The shipping point was fixed, and Saito could protect himself against any unreasonableness in its operation. If he persisted in planting pines, or becoming interested in pines to the extent of owning or controlling them, at places remote from and inaccessible to the shipping point at Leilehua, that was his own lookout. It was up to him to deliver the fruit to

railroad cars at Leilehua, and all he had to do to escape any alleged hardship was to refrain from planting or otherwise dealing in pines remote from and inaccessible thereto, and confine himself to the planting, or owning, or controlling of pines within reasonable hauling distance of the shipping point. The remedy lay absolutely with him. The contract could not operate with respect to any pines, without Saito's consent. He had to take the initiative. If he did not care to conduct his business in an ordinarily businesslike manner, as the contract assumed that he would, then his was the penalty.

Again, were Saito bearing the expense of delivery of the pines to the cannery of the Pineapple Company at Honolulu it might be a different proposition, but his prices were f. o. b. railroad cars at Leilehua. The expense of hauling to the railroad cars was on Saito. The expense of hauling them from the delivery station on the railroad, to the cannery of the Pineapple Company, was on the Pineapple Company. If the terms of the contract were self-operative, so that at the instance of the Pineapple Company certain pineapples became subject to the contract, the hauling of which to the railroad cars at Leilehua became an increased burden, the situation might possibly be different, but Saito could protect himself at all times.

Furthermore, the inferences of fact to be drawn from the mutual covenants of the parties in regard to the delivery of the pineapples must appear in evidence and not be based upon supposition.

The reference by the Supreme Court to Waimanalo is unfair. Waimanalo is not on the railroad. The delivery of fruit was f. o. b. railroad cars. Moreover, the general knowledge of local railroad facilities by the parties would indicate that they intended to limit the Planter, as far as the Island of Oahu was concerned, to localities within reasonable hauling distance of Leilehua station, and did not contemplate remote localities off the line of the railroad.

We thus have the wholly clear and unambiguous covenant of the Planter to the effect that he was obligated to sell all of his pineapples grown on lands held by him, whether at the time of his contract or subsequently acquired; and we have the three later provisions of the contract expressing in *clear and unambiguous language that the obligation of the Pineapple Company was likewise to purchase from the Planter all pineapples grown, owned or controlled by him on the Island of Oahu.* Such ambiguity, therefore, as may be conceded to exist in the paragraph of the contract setting forth the obligation of the Pineapple Company, may be resolved and removed entirely when read in connection with the other wholly unambiguous portions of the contract. A person naturally would not, as did the Supreme Court, seize upon the ambiguous portion of a contract and guess at its construction by a consideration of its language, without reference to the remaining portions of the contract, and, this done, then essay to bring harmony into the contract as

a whole by narrowing the scope of wholly unambiguous parts of the contract, to have them correspond with the supposed interpretation of the ambiguous portions thereof. The interpretation of the Supreme Court defining the Pineapple Company's obligation to be that of purchasing pineapples grown only on the present holdings of the Planter, wherever located or owned or controlled on the Island of Oahu, nullifies and ignores the later clear and unambiguous definition of the Pineapple Company's obligation which, as we have seen, occurs three times in a subsequent paragraph of the contract, and needlessly narrows and in part nullifies the clear and unambiguous terms of the Planter's obligation contained in the next paragraph of the contract. In scientific research and in the ordinary affairs of life we are taught to go from the "known to the unknown." By analogy, in seeking to find the intention of the parties to a contract from an inspection of its terms, it would seem to be both scientific and natural for the court to proceed from the unambiguous portions of the contract, where the intent of the parties is clearly expressed, and then proceed to the ambiguous portions thereof for the purpose of attempting to resolve the ambiguities in the light of the clear and unequivocal portions of the contract.

Appellant cannot refrain from again emphasizing the rule of construction applicable to all contracts, that the contract should be construed as a whole, in an endeavor to bring all parts, if possible, into har-

mony one with another, and in an endeavor to give every word, phrase and clause a meaning, if possible. This rule is excellently stated in

Unita Tunnel etc. Co. v. Ajax Gold Mining Co., 141 Fed. 563, 566,

wherein the court said:

> "The purpose of a written contract is to express the concurring intention of the minds of parties when it is made. Hence the object of its construction or interpretation is to ascertain the actual intent and meaning of the parties when they executed it. Familiar and serviceable rules of interpretation of agreements are that the Court may place itself as near as may be in the situation of the parties to the agreement at the time it was made, and may then endeavor to ascertain from the terms of the contract, in the light of the surrounding facts and circumstances, the actual intent and meaning of the parties; *that this intention must be deduced, not from specific provisions or from fragmentary parts of the instrument, but from its entire context, because the intent is not evidenced by any part or provision of it, or by the instrument without any part or provision, but by every part and term so construed as to be consonant with every other and with the entire agreement; that every provision of the instrument should be given its ordinary meaning and effect, if possible, and no part should perish by construction; and that the actual intention of the parties, when ascertained, must prevail, regardless of dry words, inapt expressions, or careless recitations in the contract."*

It is, therefore, respectfully submitted that the intrinsic evidence afforded by an examination of the contract within its four corners, necessitates a

construction by the court to the effect that the obligations of the Pineapple Company and of the Planter were to buy and sell respectively all the pineapples grown, owned or controlled by the Planter on the Island of Oahu, both on his holdings at the time of his contract, or subsequently acquired.

Second Point.

THE EXTRINSIC EVIDENCE SHOWING THE CIRCUMSTANCES UNDER WHICH THE CONTRACT WAS MADE, INCLUDING THE SITUATION OF THE SUBJECT-MATTER OF THE CONTRACT AND OF THE PARTIES TO IT, ESTABLISHES THAT THE PARTIES INTENDED TO INCLUDE PINEAPPLES GROWN, OWNED, OR CONTROLLED ON THE ISLAND OF OAHU SUBSEQUENT TO THE DATE OF SAID CONTRACT.

> "In arriving at the intention of the parties, where the language of a contract is susceptible of more than one construction, it should be construed in the light of the circumstances surrounding them at the time it is made, it being the duty of the Court to place itself as nearly as may be in the situation of the parties at the time, so as to view the circumstances as they view them, and so to judge of the meaning of the words and the correct application of the language of the contract." (13 C. J., 542, and cases cited.)

With this elementary and wholesome principle of construction in mind, let us turn to the evidence in the case.

On May 18, 1916, the date of the contract between the Pineapple Company and Saito, all of Saito's

holdings were located at Leilehua, Oahu, and comprized approximately one hundred and fifty acres of arable land, and this fact was of course known to both parties to the contract. (228) The exact acreage of Saito's present holdings was known to the Pineapple Company and was indeed endorsed by the Pineapple Company at the foot of the contract, as follows: "Approximately 150 acres". (236) And there was also endorsed thereon the estimated yield of pineapples in the following words: "Approximately 1500 tons (Class B 200 tons)." (236) If it had been the intention of the parties to contract only for the yield from Saito's "present holdings at Leilehua", and it was known that his only present holdings were located at Leilehua, why, let us ask, did the agreement provide for "present holding elsewhere on the Island of Oahu, and present holdings that Saito might own or control on the Island of Oahu". Did the Pineapple Company think that Saito might possibly have concealed from it some of his "present holdings" elsewhere than at Leilehua, and which he might secretly own or control elsewhere, and did the Pineapple Company desire to preserve its rights as to such present holdings in case any such were subsequently discovered? But Saito had been a planter for ten years before (225); the Pineapple Company had had a previous contract with him which was canceled by the subsequent contract of May 18, 1916. (34) Of course there was no such thought or purpose in the mind of the Pineapple Company. Either the words in the covenant

of the Pineapple Company, "or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu", refer to "present holdings" as appellees and the Supreme Court contend, in which case they are absolutely meaningless in the light of the surrounding circumstances, or they were put into the contract for a purpose, in order to cover *pineapples grown* "elsewhere than on his present holdings at Leilehua", and *pineapples* "that he may own or control on the Island of Oahu".

It does seeem that when the evidence showing the surrounding circumstances is read and considered by the court, that the construction contended for by appellant is so plain that "he who runs may read".

There is the further fact that at the time the Pineapple Company made its contract with Saito, on May 18, 1916, the cannery business was looking very favorable after a prior period of depression. (227) It was probable that the Pineapple Company would want to purchase as large a quantity of pineapples as it could contract for.

It also appears that Saito was only a grower of pineapples and not a canner, and was dependent on the sale of his crop to some canner. (225) Since he made the contract of May 18, 1916, with the Pineapple Company, which to him at the time must have seemed favorable, it is but natural that he would desire, during the four-year period of his contract, to sell to the same canner, his pineapples

grown, owned, or controlled by him during that period, whether from holdings possessed at the time of said contract or subsequently acquired. In fact, it is admitted that "the grower always contracts ahead and the canners always make provision for their packs by contracts for from one to five years". This has been customary with both planter and canner for the past fifteen years. (241)

It is, therefore, respectfully submitted that in addition to the intrinsic evidence afforded by the inspection of the contract itself, the evidence showing the surrounding circumstances of the parties at the time of entering into the contract shows most conclusively that it was the unquestionable intent of the parties that *pineapples grown, owned, or controlled by Saito,* whether from his *present holdings* or *subsequently acquired holdings,* should be included within the contract of May 18, 1916.

In the discussion of our next point we shall see that in fact Saito did sell to the Pineapple Company all of the pineapples grown, or owned, or controlled by him, from subsequently acquired lands, until April 1, 1918, when the tempter came to Saito in the form of the Libby Company, who, although they were advised of his contract with the Pineapple Company, nevertheless offered him more for his pineapples than was provided by his contract with the Pineapple Company, and Saito then concluded to break his contract with the Pineapple Company and delivered his pineapples from subsequently acquired lands to the Libby Company.

Third Point.

THE PRACTICAL CONSTRUCTION OF THE AGREEMENT BY THE PARTIES FOR NEARLY TWO YEARS AFTER IT WAS MADE, IN STRICT ACCORDANCE WITH ITS TERMS AND INTENT AS CONTENDED FOR BY APPELLANT, SHOWS THAT THE PARTIES INTENDED THAT ALL PINEAPPLES GROWN, OWNED OR CONTROLLED ON SUBSEQUENTLY ACQUIRED LANDS SHOULD BE INCLUDED WITHIN ITS TERMS.

It is another elementary but cardinal rule of construction of a contract in case of ambiguity, that

> "where the parties to a contract have given it a practical construction by their conduct—as by acts in partial performance—such construction is entitled to great, if not controlling, weight in determining its proper interpretation, particularly where such interpretation is agreed upon before any controversy has arisen". (13 C. J., 546, and cases cited.)

When, subsequent to May 18, 1916, Saito secured the leasehold interests dated respectively July 1, 1916, and August 10, 1916, he straightway proceeded to deliver the pineapples grown thereon to the Pineapple Company, and the Pineapple Company accepted them and paid for them at the prices provided for by the agreement of May 18, 1916 (239), and this was done although prices of pineapples had advanced one dollar per ton for the larger size, and fifty cents per ton for the smaller size, over the contract prices named in the contract of May 18, 1916. (239) If Saito had not understood that the subsequently acquired pineapples were covered by his contract with the Pine-

apple Company, why did he do this; especially when he could have sold these pineapples either to the Pineapple Company or to one of the other four canning companies. (225) In the statement of evidence prepared by the Chief Justice of the Supreme Court it is stated (238) that Saito continued to sell the pineapples harvested by him from the subsequently acquired leasehold interests up to the end of January, 1918. The admission of Saito himself in his answer, however, goes further and Saito

> "admits that up to April 1, 1918, he delivered to said complainant all Smooth Cayenne pineapples grown by him upon land leased by him upon the Island of Oahu, but denies that he so delivered them under the terms of said contract". (138)

Shortly prior to the cessation of his deliveries of these pineapples to the Pineapple Company, he and one Judkins, the manager of the Libby Company, began their negotiations which led up to the subsequent agreement dated April 1, 1918, between the Libby Company and Saito.

Another controlling circumstance in the subsequent conduct of the parties is the loan made by the Pineapple Company to Saito, on August 10, 1916, to enable him to purchase from the Oahu Railway & Land Co. the subsequently acquired lease of August 10, 1916. (238) It is undisputed that when Saito desired to purchase this leasehold interest for $6000 he applied to the Pineapple Company for the money, and the Pineapple Company advanced him

the money for the purpose of purchasing this leasehold interest, and the money was actually applied to that end. Saito executed his promissory note, payable on or before one year subsequent to August 10, 1916, for $6000, payable to the Pineapple Company and also executed his mortgage to secure said note, on the crops to be harvested from the leaseholds of February 5, 1913, January 2, 1915, and August 10, 1916. (238) The mortgage, copy of which constitutes Exhibit B to Saito's answer (154 to 159), did not require Saito to sell the pineapples produced from any of the lands covered by these leaseholds, to the Pineapple Company, for the reason that Saito was already obligated under his agreement of May 18, 1916, to sell all of the pineapples produced from these leaseholds, to the Pineapple Company. What other object or motive did the Pineapple Company have in advancing the six thousand dollars to Saito, to purchase the leasehold interest of August 10, 1916, unless it was to enable Saito to increase his holdings of pineapples and thereby increase his deliveries of the same to the Pineapple Company. It is perfectly obvious that the Pineapple Company must have understood that it was entitled to receive these pineapples produced from the leasehold of August 10, 1916, or it would have made a supplementary contract with Saito at the time, by which he would have agreed to make deliveries of the pineapples to the Pineapple Company. This would have been only common prudence. And Saito must just as clearly have known

that the Pineapple Company understood that it was entitled to receive these pineapples, and he apparently himself understood that he was obliged to deliver the pineapples produced from this subsequently acquired leasehold. Otherwise, why should he have done so in the face of advancing prices, especially when he was not by any terms of the mortgage obligated in any way to make deliveries of any of these pineapples?

What does Saito say by way of explanation of his conduct?

> "Saito testified on the witness stand that he delivered the pineapples produced from the Chang Chow lot (forming part of the August 10, 1916, leasehold) to the Hawaiian Pineapple Company, Limited, because of the fact that he had borrowed money from the Pineapple Company." (240)

But the insufficiency of this answer is shown by the fact that he was free to have sold the pineapples from this leasehold to third parties for an increased price, and thus have repaid his loan to the Pineapple Company even sooner than he did, had he not believed himself at the time obligated by his contract to sell these pineapples to the Pineapple Company.

In the second place,

> "on the 10th of September, 1917, a statement of account was rendered to Saito by the Hawaiian Pineapple Company, Limited, showing a balance due him of $7204.83, for which he received a check. Shortly thereafter Saito's lease of the

> Chang Chow lot covered by the mortgage was returned to him''. (238)

Saito's promissory note was marked by the Pineapple Company "Paid Sep. 10, 1917", and returned to him. (153)

> "Saito continued to sell the pineapples harvested by him from the premises subject to the lease of August 10, 1916, during the remainder of the year 1917, and up to April 1, 1918,''

as stated by respondent in paragraph IX of his answer (138),

> "and all pines delivered by Saito to the Company were for the same price stipulated in the agreement of May 18, 1916". (239)

In further contradiction of Saito's statement that the pines from the leasehold of August 10, 1916, were not delivered to the Pineapple Company pursuant to the agreement of May 18, 1916, is the evidence of the witness K. Shibyama, a disinterested witness who acted as interpreter in a conference between Mr. E. C. Peters, one of the attorneys for the Pineapple Company, and Saito, which was had at the home of Saito at Leilehua in the month of June, 1918. Shibyama testified

> ''that in the course of this conversation Saito, in reply to questions propounded by Mr. Peters, stated that up to the time he (Saito) saw Mr. Judkins, of Libby, McNeill & Libby of Honolulu, Limited, he believed that he was obliged to deliver the pines which he took off the twenty-acre lot, known as the Chang Chow premises (and constituting part of the leasehold inter-

> est of August 10, 1916), to the Hawaiian Pineapple Company, Limited, under his contract with them". (240)

It is true that Saito had preceded Shibyama on the witness stand and had at that time denied this conversation (240), but in the face of Saito's actions and in the face of the positive testimony of Shibyama, a wholly distinterested witness, how much weight is to be given to Saito's testimony in this regard? The timeworn maxim of "Actions speak louder than words", is strictly applicable to the present situation.

Another circumstance arising out of the conduct of Saito and tending to show his intent that all pineapples grown on land subsequently acquired by him should be included within the terms of his contract with the Pineapple Company, dated May 18, 1916, is that according to Saito's own admission (paragraph IX of his answer) he went into possession of Lot 9, constituting a part of the leasehold interest of August 10, 1916, on or about June 16, 1916, and proceeded to cut the lantana therefrom, and to clear the same, and to plow it, and to prepare it for planting pineapples. This was less than a month after the execution of his contract with the Pineapple Company. That Saito planted this land in the summer and fall of 1916 is indicated by his first fruit ripening on Lot 9 in June and July, 1918 (240-243), after the usual period of growth of fruit of eighteen to twenty-four months. (226) Saito knew that his fruit would mature dur-

ing the period of this contract. He was an independent grower and employed others for the canning of his fruit. (225) Is it reasonable to suppose that in May 1916, the date of his contract with the Pineapple Company, he intended thereby to provide only for the pineapples that he might for a period of years grow on the one hundred and fifty acres of his then present holdings, and to contract independently with another cannery for the pineapples that he might grow on Lot 9, of 12.8 acres, which (upon the basis of twelve to thirteen tons to the acre) (240) would produce a maximum crop of one hundred and sixty-six odd tons of both grades? These additional pineapples were intended to be included with the pineapples that Saito might "grow on the Island of Oahu", "elsewhere" than on his "present holdings", and it was not until two years later—to be exact, April 1, 1918—that any attempt was made by him to contract with anyone else in respect to pineapples grown on Lot 9. The cost of clearing the land and plowing and planting it to pines was considerable. The situation of the pineapple industry up to 1914-15 was very precarious. Pineapples sold that year below $5.00 a ton, and the larger size sold at $8.00 per ton. In May, 1916, the pineapple business was still very uncertain and the canneries, including that of appellant, were still carrying a heavy stock of pineapples of previous years, which they (227) had been unable to sell. (228) Saito was not satisfied with his "present holdings" and he wanted to secure further areas.

He had a good contract with the Pineapple Company and the future looked brighter. He had a fixed outlet and contract for any pines that he might "grow * * * elsewhere on the Island of Oahu". His prices for his pineapples were fixed by his contract with the Pineapple Company and there was no chance of his getting caught as some planters had been caught in 1914 to 1915, because of their inability to sell their fruit.

Lot 1, of twenty acres, also forming part of his subsequently acquired leasehold interests was planted and bearing and would have a ratoon crop in 1917. The pines that were maturing on Lot 1 in the harvesting period from June, 1916, on to the end of the year, though not grown by Saito in the strict sense of the word, could be considered, and would come under his contract, as pineapples "owned" by him. Those which he would continue to cultivate and which would ratoon in 1917 would come under the contract, and be subject thereto, as pineapples "grown" by him on premises other than his "present holdings". Lots 2 and 3, consisting of 6.36 and 8.55 acres respectively, were planted and would mature in July, 1918 (240-243), at the same time as his plant crop on Lot 9, and would ratoon similarly as the plants on Lot 9, in the summer and winter of 1919.

The Supreme Court did not consider the circumstances that between May, 1916, and December, 1917, all of the premises subject to the subsequently acquired leaseholds of July 1, 1916, and August 10,

1916, were planted to pines to mature in 1917, Lots 2 and 3 in plant to mature in the summer of 1918, Lot 1 with ratoon in 1917, Lot 9 was planted with fruit to crop in 1918, and Lots 10 and 11 were planted with fruit to crop in the summer of 1919, and that from Lots 9, 2 and 3 there would also be ratoons in 1919.

This expenditure of time and money by Saito was absolutely disregarded by the court. To our mind they are extremely important when we consider that in the face of this large expenditure of money, contemplating future results covering a period of years, Saito made no attempt to contract elsewhere for the sale of his pineapples until he was approached by the Libby Company and Saito's cupidity was aroused by the knowledge that he could obtain a better price by selling his pineapples to the Libby Company.

It is, therefore, respectfully submitted that the subsequent conduct of the parties for a period of nearly two years after the execution of their agreement of May, 1916, in strict accord with the terms of said agreement as contended for by the appellant, shows conclusively that it was the intention of both parties that all pineapples grown, owned, or controlled by Saito on the Island of Oahu were contracted to be sold to the Pineapple Company.

Fourth Point.

THE CASE IS A PROPER ONE FOR THE EQUITABLE JURISDICTION OF THE COURT.

It should be observed at the outset that both the trial court and the Supreme Court held that the case was a proper one for injunctive relief as prayed for by appellant if Saito was obligated under the terms of his contract with the Pineapple Company to deliver the pineapples grown upon his subsequently acquired lands. (185)

A full analysis of the evidence and a citation of authorities is contained in the opinion of the Chief Justice (179-185), and reference is hereby made to the opinion. In the course of its opinion the court said:

> "The evidence shows that practically all of the pineapples grown and produced in 1918 on the Island of Oahu were contracted for and that it was impossible for the company, by purchase or otherwise, to secure other pineapples in lieu of those which it claimed to be entitled to receive from Saito. It will thus be seen that an entirely different state of facts exists to those present in the case of *Lum Wai v. Hong Hoon,* 24 Haw, 696, recently decided by this court. In that case, specific performance of a contract for the sale of taro was found, but it was not shown that other taro could not be purchased in the open market, and for that reason it was held that a court of equity was without jurisdiction. * * * But in the Lum Wai case, it was further held that where the chattels are such that they are not obtainable in the market or can only be obtained at great expense and inconvenience and failure to obtain them causes a loss which

could not be adequately compensated in an action at law, a court of equity will decree specific performance. (179-180) * * * *

Had the complainant in this case proceeded at law against the defendant for breach of contract, its measure of damages would have been limited to the difference between the contract and the market price of the pineapples at the time of the breach of the contract, for we are clearly of the opinion that, although perhaps there was a very little, if any, of the article to be obtained in the market at the time of the alleged breach, pineapples in the territory at all times possess a market value which may easily be established in a court of law. Under these circumstances, assuming that the complainant had gone to a court of law for redress, could it have obtained adequate relief? We think not. Complainant contracted to purchase the pineapples for the proper and economical operation of its cannery. The failure of Saito to deliver the pines caused a decrease in the 1918 pack estimated at between 15,000 and 22,000 cases. In view of the fact that other pineapples were not obtainable by the complainant in lieu of those involved in this suit, complainant was bound to have sustained a loss which could not have been adequately measured in damages in a court of law under the rules herein laid down. Cans and other equipment, labor, etc., were required to be provided in advance to take care of the contemplated operation of the cannery, based upon the estimated tonnage of pineapples to be received at the cannery, and for this reason the principles announced in the case of *Curtice Bros. Co. v. Catts,* 96 Atl. 935, applied.

In that case it was held that where the defendant contracted to sell to the plaintiff the entire product of certain lands planted in

> tomatoes which plaintiff required for the operation of the cannery to the full capacity thereof, a specific performance of the contract by defendants would be decreed upon their refusal to fulfill the terms of the contract. The same doctrine was adopted in Texas, Co. v. Central Fuel Oil Co., 194 Fed. 1, 13; also in Equitable Gas Co. v. Baltimore Coal Tar & F. G. Co., 63 Md. 285; also in Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92, and these authorities received the sanction of this court in Lum Wai v. Hong Hoon, supra.
>
> We are therefore of the opinion that equity had jurisdiction of the cause and that a court of equity alone could afford complainant adequate relief, provided, of course, an interpretation of the contract justifies the conclusion that there was a breach thereof."

Particular attention is called to the case of Curtice Bros. Co. v. Catts, 72 N. J. Equity 831; s. c. 66 At. 935, cited in the opinion of the Chief Justice quoted above. The facts, briefly, in this New Jersey case were that the complainant's factory had a capacity of about a million cans of tomatoes, the packing season lasting about six weeks. Preparations made for this six weeks of active work must be carried out in all features to enable the business to succeed, these preparations being based primarily on the capacity of the plant. Cans and other necessary equipment, including labor, must be provided and secured in advance, with reference to the capacity of the plant during the packing period. With this known capacity and an estimated average yield of tomatoes per acre, the acreage of

plants necessary to supply the plant is calculated. To that end the contract in question, between plaintiff and defendants, was made, with other like contracts covering a sufficient acreage to insure the essential pack. The defendants who contracted to supply a given acreage, refused to perform their contract, and plaintiff sought equitable relief to enforce the provisions of the contract. The court in sustaining the equitable jurisdiction of the court. said:

> "A refusal of the parties who contract to supply a given acreage to comply with their contracts leaves the factory helpless except to whatever extent an uncertain market may perchance supply the deficiency. The condition which arises from the breach of the contracts is not merely a question of the factory being compelled to pay a higher price for the product. Losses sustained in that manner could with some degree of accuracy be estimated. *The condition which occasions the irreparable injury by reason of the breaches of the contracts is the inability to procure at any price at the time needed and of the quality needed, the necessary tomatoes to insure the successful operation of the plant.*
>
> "If it should be assumed as a fact that upon the breach of contracts of this nature other tomatoes of like quality and quantity could be procured in the open market without serious interference with the economic arrangements of the plant, a court of equity would hesitate to interfere; *but the very existence of such contracts proclaims their necessity to the economic management of the factory.* * * * The business and its needs are extraordinary in that the maintenance of all the conditions prearranged to secure the pack are a necessity to insure the successful operation of the plant.

> * * * The objection that to specifically perform a contract personal services are required, will not divest the court of its powers to preserve the benefits of the contract. Defendant may be restrained from selling the crop to others, and if necessary a reciever can be appointed to harvest the crop."

In Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92, specific performance of agreement to furnish fish skins was granted where it was shown that such skins were not otherwise purchasable on the open market except at great expense and inconvenience.

In Vail v. Osborne, 174 Pa. St. 580, defendant was enjoined from breaking his contract to sell bark to others, where it was shown that the bark had a peculiar value to the plaintiff because of its proximity to plaintiff's manufacturing plant.

See also to same effect:

> Mutual Oil Co. v. Hills, 248 Fed. 257;
> Maloney v. Cressler, 236 Fed. 636.

The above cases show that the only reason that damages at law were ever considered adequate in the case of a contract for the purchase or sale of chattels, was because that with the money you received by way of damages at law you could purchase like chattels to answer the same purpose. However, as in this case, where you can not buy the article contracted for in the open market, and when you need that article in the active carrying on of a business such as the operation of a cannery, then the legal remedy is totally inadequate and equity will enjoin a breach of contract. If equity left complain-

No. 3374

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

2

HAWAIIAN PINEAPPLE COMPANY, LIMITED (a corporation),

Appellant,

vs.

MASAMARI SAITO and LIBBY, MCNEILL & LIBBY OF HONOLULU, LIMITED (a corporation),

Appellees.

BRIEF FOR APPELLEES.

THOMPSON, CATHCART & LEWIS,
BARRY S. ULRICH,
Honolulu, T. H.,
Solicitors for Appellees.

PILLSBURY, MADISON & SUTRO,
L. G. MCARTHUR,
San Francisco, California,
Of Counsel.

FILED
OCT 15 1920
F. D. MONCKTON,
CLERK.

INDEX.

Page

Statement of Case.............................. 1

Brief of Argument.............................. 8

I. The Construction of the Contract. The Intrinsic Evidence 8

A. The paragraphs in the contract imposing corresponding obligations upon the Pineapple Company and the Planter, show that the contract applies only to pineapples grown or owned or controlled by the Planter on present holdings or at the present time 8

B. The contract considered as a whole clearly refers only to pineapples grown or owned or controlled by the Planter on present holdings or at the present time 19

1. The provision for the delivery F. O. B. cars at Leilehua, indicates clearly an intent to contract with respect to the then holdings of the Planter, all of which were known to be at Leilehua..... 20

2. The endorsement placed on the last page of the contract by the clerk of the Hawaiian Pineapple Company, prior to its execution by the Company: "Approximately 150 acres. Approximately 1500 tons (Class B 200 tons)" considered as a part of the contract itself. If it was a part of the contract, it is decisive of the dispute....... 29

II. Evidence Outside of the Contract Itself Explanatory of Its Meaning. The Extrinsic Evidence.. 35

A. The circumstances under which the contract was made show clearly that the parties intended to contract with respect to a then definitely ascertained quantity of pineapples.............................. 35

Page

B. The endorsement made on the contract by the Hawaiian Pineapple Company: "Approximately 150 acres. Approximately 1500 tons (Class B 200 tons)", even though considered not an actual part of the contract, is evidence clearly showing the intention of the parties at the time of entering into the contract, to contract with respect to the 150 acres referred to only 39

C. The fact that Saito sold pineapples from a single small twenty acre lot, a part of the after-acquired premises, to the Hawaiian Pineapple Company at the same price as the prices stipulated in his previous contract is of no value as showing any construction placed upon the contract of May 18, 1916. The arguments of appellant relative to the construction of the contract by the parties considered 42

III. ALL RULES OF LAW GOVERNING THE CONSTRUCTION OF CONTRACTS WHICH ARE APPLICABLE TO THIS CASE CONTRIBUTE TO MAKE MORE SURE THAT THE CONSTRUCTION CONTENDED FOR BY THE APPELLEES IS CORRECT 47

A. Where any doubt arises as to the construction of a contract, it must be considered most strongly against the person using the language employed, and this is particularly true in the case of a printed form prepared by one of the parties 47

B. Particular language confining or limiting the operation of a contract governs more general language found elsewhere in the contract 50

C. Where doubt exists, that construction of a contract which will make it reasonable and just should be adopted by the court 50

D. Where part of a contract is printed and another part is in writing, the part in writing must prevail 52

Page

E. Where under a proposed construction of a contract, contingencies might arise which would render performance impossible, that construction cannot be adopted as against a construction where there could be no impossibility of performance.............. 53

F. A contract will be construed if possible in such a way that the obligations and counter-obligations imposed wil be mutual......................... 54

IV. THE COURT IN EQUITY WAS WITHOUT JURISDICTION TO PROCEED BECAUSE THE LEGAL REMEDY WAS ADEQUATE 56

V. THIS COURT IS WITHOUT JURISDICTION TO HEAR AND DETERMINE THIS APPEAL BECAUSE THE DECREE OF THE SUPREME COURT OF HAWAII APPEALED FROM IS NOT FINAL 62

No. 3374

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Hawaiian Pineapple Company, Limited (a corporation), *Appellant,* vs. Masamari Saito and Libby, McNeill & Libby of Honolulu, Limited (a corporation), *Appellees.*	}

BRIEF FOR APPELLEES.

Statement of the Case.

In the original bill of complaint filed in equity, in this case, the prayer was for the issuance of an injunction enjoining Masamari Saito from selling and delivering, and Libby, McNeill & Libby of Honolulu, Limited, a corporation, from buying and receiving pineapples grown on certain lands held under lease by Saito, which pineapples Libby, McNeill & Libby had contracted to purchase under a contract dated April 1, 1918. The basis of the prayer was the contention that the pineapples in question were covered by a previ-

ous contract between Saito and the complainant, the Hawaiian Pineapple Company, Limited, dated May 18, 1916, and that Saito was under obligation, by virtue of that contract, to sell and deliver them to the Hawaiian Pineapple Company. The pineapples in question were grown on lands which had been acquired by Saito after the execution of the contract of May 18, 1916, with the Hawaiian Pineapple Company, and the question presented to the court was whether or not that contract covered pineapples to be grown on lands which were not held or controlled by the planter at the time of its execution. The trial judge in equity first issued a temporary injunction upon the filing of a satisfactory bond and, subsequently, after hearing, granted the prayer of the complainant and made the injunction permanent. Upon an appeal taken to the Supreme Court of the Territory of Hawaii, that court decided that under the terms of the contract of May 18, 1916, Masamari Saito was not obligated to sell and deliver to the Hawaiian Pineapple Company, Limited, pineapples grown by him on lands acquired after the date of that contract. Pursuant to this decision, the decree of the trial judge appealed from was vacated and set aside, the injunction was dissolved, and the cause was remanded to the court below for further proceedings consistent with the opinion. From this decree of the Supreme Court of Hawaii, this appeal has been taken.

The facts pertinent to the questions now presented to this court, may briefly be summarized as follows:

Under date of May 18, 1916, the Hawaiian Pineapple Company, Limited, appellant herein, entered into the contract referred to with the appellee, Masamari Saito, an independent pineapple grower, with pineapple holdings at Leilehua on the Island of Oahu, comprising approximately one hundred and fifty (150) acres of arable land. The contract in question contained the following mutual covenants and undertakings:

> "The Pineapple Company agrees that during the term of four years beginning May 1, 1916, and ending April 30, 1920, it will handle and buy under the conditions as hereinafter detailed, and with such exceptions as are hereinafter stated, all the merchantable Smooth Cayenne Pineapples that may be grown by the Planter on his present holdings at Leilehua, or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu."
>
> "The Planter agrees that he will deliver to the Pineapple Company, under the terms and conditions and with the exceptions hereinafter contained, all the merchantable Smooth Cayenne Pineapples that he may grow at Leilehua, or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu, during the term stated."
>
> * * * * * * *
>
> "It is mutually agreed that the Pineapple Company will furnish f. o. b. Railroad Cars at Leilehua, Oahu, lug boxes for the delivery of the fruit, and that the Planter will deliver said fruit f. o. b. Railroad Cars at Leilehua, Oahu, in said lug boxes, and that the said merchantable pineapples will be delivered in such condition of ripeness as may from time to time be required or designated by the said Pineapple Company."

The contract in question was on a regular printed form of contract prepared by the Hawaiian Pineapple Company, Limited, for use in contracting with planters,

with blanks left for the filling in of the name of the place where the lands to be covered by the contract were located, for the date, for the name of the planter, his place of residence, and for the place at which the delivery of the fruit was to be made (Trans. p. 236).

The printed form of contract was taken to Saito at his home at Leilehua and his signature was procured before these blanks had been filled in. The blanks were subsequently filled in by a clerk of the Hawaiian Pineapple Company, Limited, prior to the execution of the contract by the company and at or about the same time the following endorsement was made by the clerk of the Hawaiian Pineapple Company upon the contract near the bottom of the last page:

"Approximately 150 acres. Approximately 1500 tons (Class B 200 tons)" (Trans. p. 236).

As has been indicated, at the time of the execution of the contract, all of Saito's holdings were at Leilehua, Oahu, and comprised approximately one hundred and fifty (150) acres. A copy of the contract as thus finally completed and executed was delivered to Saito.

Upon these facts the question is presented: Does this contract cover pineapples grown during the period stated upon the one hundred and fifty (150) acres held by Saito at Leilehua at the time of the execution of the contract, or does it apply to all pineapples which Saito might grow, or own, or control, anywhere on the whole Island of Oahu during the four (4) year period?

This very question was argued at length before this court on the hearing of appellant's petition for an injunction pending the appeal. In its opinion denying the application for the injunction, this court held that the Supreme Court of Hawaii did not err in deciding that there was no obligation upon Saito to sell to the appellant the pineapples produced from any lands which were leased or acquired by him after the date of the contract. The court said:

> "We have assumed in our consideration of the petition submitted to us that there was sufficient ground for equitable cognizance, and upon that assumption have given earnest consideration to the true interpretation of the contract between Saito and the Pineapple Company, and our opinion is that the Supreme Court of the territory appears to have been correct in holding that there was no obligation upon Saito to sell to the Pineapple Company pineapples produced from any lands which were leased or acquired by him after the date of the making of the contract" *(Hawaiian Pineapple Company, Ltd. vs. Masamari Saito et al.,* 260 Fed. 153, 154).

In its *"Assignment of Errors upon Appeal",* the appellant has set forth sixteen (16) alleged errors. These sixteen alleged errors have again been set forth in full in appellant's brief. An examination of these sixteen errors will show that they really are substantially one and the same alleged error set forth in sixteen different ways. In various ways the appellant says that the Supreme Court of the Territory of Hawaii erred in holding that upon the evidence the contract in question should be construed as applying only to pineapples to be grown or owned or

controlled by Saito upon the lands held by him at the time of the execution of the contract referred to, and in rendering its decree accordingly.

The controversy has arisen because the appellee, Masamari Saito, after the date of his contract with the appellant, acquired other pineapple lands, and upon a subsequent date, April 1, 1918, sold the pineapples to be grown on those after-acquired lands to the appellee, Libby, McNeill & Libby of Honolulu, Limited. The injunction, which has been dissolved by order of the Supreme Court of Hawaii, was intended to prevent the further performance of the contract of April 1, 1918, between Saito and Libby, McNeill & Libby of Honolulu, Limited.

Upon these facts it is respectfully submited that the Supreme Court of the Territory of Hawaii was correct in holding that the contract in question did not apply to pineapples grown by Saito on lands acquired by him after the date of the execution of that contract.

A court in construing a contract may and must look first and primarily to the language used in the contract itself, and to all of its language, and then if anything remains ambiguous or unexplained, the court may permit itself to be aided in giving construction to such ambiguities by evidence of extraneous circumstances tending to explain but not to contradict the written terms of the instrument itself. We shall therefore consider the question of the construction of this contract in the following manner:

First. Giving our attention to the question as to what the language of the instrument itself really means.

Second. Considering what light is thrown upon the construction of the contract by evidence which was before the court in this case, bearing upon and tending to explain uncertain or ambiguous parts of the contract, if there were such parts, and

Third. Considering those well-established rules of law governing the construction of contracts which are applicable, each of which we contend contributes to make more sure that the construction adopted by the Supreme Court of the Territory of Hawaii is correct.

Finally, we shall briefly call the court's attention to the further contentions:

First. That the trial court in equity was without jurisdiction to decree or by injunction cause the specific performance of a contract to sell chattels, where, as in this case, the damage which would result from the failure to sell and deliver those chattels could be easily and accurately ascertained, there being therefor a perfectly adequate remedy at law.

Second. That this court at this time is without jurisdiction to hear and determine the questions presented by this appeal for the reason that the decree of the Supreme Court of Hawaii appealed from does not constitute a final adjudication of the rights of the parties, the cause having been remanded to the lower court for further proceedings consistent with the opinion.

Brief of Argument.

I.

THE CONSTRUCTION OF THE CONTRACT.

A.

The paragraphs in the contract imposing corresponding obligations upon the Pineapple Company and the Planter, show that the contract applied only to pineapples then owned or controlled or to be grown on lands then held by Saito.

In view of the obvious reasonableness of the contention that the contract referred to was intended by the parties to be a contract relative to certain known pineapple lands, and in view of the almost preposterous character of the suggestion that the Pineapple Company was really contracting for any pineapples which the planter might in any way have under his "control", during the period of four (4) years, which might mean every pineapple produced upon the whole Island of Oahu, the appellant has in its brief adopted the rather curious procedure of constructing an imaginary argument for the appellees, one which is not contended for by them at all, and then of proceeding to demolish that imaginary argument. Appellant says that it is our contention that the phrase "that he may own or control on the Island of Oahu" found in the paragraph outlining the obligation of the Pineapple Company refers to and modifies "present holdings" and not "pineapples", and that, therefore, the Pineapple Company agrees to buy only pineapples which may be grown by the planter and not pineapples which may be owned or controlled by him. They contend that this construction is inconsistent with

the subsequent paragraphs of the contract which define the pineapples contracted for as "pineapples grown, owned or controlled by the planter". This is not our contention. Our contention throughout has been that the Pineapple Company contracted to purchase all pineapples which might be grown by the planter on his holdings at Leilehua or all pineapples which might merely be owned or controlled by the planter on present holdings or at the present time, a construction which gives meaning to every word of the contract and which is entirely consistent with every provision of it. In order that our contention may be clearly understood in this connection it will be well to consider in detail the exact language of the contract, first considering the paragraph outlining the obligation of the Pineapple Company and second the paragraph outlining what we contend is the entirely mutual and corresponding obligation of the planter.

In the first place we have the undertaking of the Pineapple Company. The language of that undertaking is as follows:

> "The Pineapple Company agrees that during the term of four years beginning May 1, 1916, and ending April 30, 1920, it will handle and buy under the conditions as hereinafter detailed, and with such exceptions as are hereinafter stated, all the merchantable Smooth Cayenne Pineapples that may be grown by the Planter on his present holdings at Leilehua, or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu."

This is clearly the undertaking of the Pineapple Company to handle and buy such pineapples, and only such

pineapple crops as were owned or controlled by the planter at the time of the execution of the contract. To give to the language used any other construction, would be to make it unreasonable and indeed practically impossible of performance.

The paragraph reads that under the conditions detailed, the Pineapple Company agrees to handle and buy all merchantable, smooth, Cayenne pineapples which the planter may grow on his present holdings at Leilehua, or on his present holdings elsewhere on the Island of Oahu, or all pineapples which he may now in any way own or control on the Island of Oahu.

To give the auxiliary verb "may" in the phrase "may own or control" a present tense is to give it the only construction which is at all consistent with reason.

Unlike many verbs, the auxiliary verb "may" does not show by its form the tense in which it is used. The tense may be present or it may be future, and in each case the context must be looked to, to determine which it is. The context in the present case shows clearly that the tense of the verb is present.

In the first place, the Pineapple Company undertakes to buy pineapples which may be grown on the present holdings at Leilehua, or the present holdings elsewhere on the Island of Oahu, and then to make sure that the planter shall not escape the obligation to sell all of the pineapples which the Pineapple Company has calculated within its estimate of what his holdings are, on the ground that the pineapples are not in fact grown by him, but are rather grown by others on some basis of

sharing in the profits, as is often the case among Japanese planters, a clause is added such as will cover and apply to the pineapples in the event that they are merely owned or controlled by the planter.

It is a well-known fact and a fact clearly within the understanding of the parties to this contract that a so-called Japanese Pineapple planter makes all sorts of arrangements with other Japanese for the cultivation of pineapples upon his holdings. It is rarely, if ever, the case, that a single Japanese planter with holdings of the extent of the holdings of Saito, himself plants, cultivates and harvests his own pineapples. Very frequently he himself has nothing to do with the actual growing of the pineapples upon his lands. With respect to a certain number of acres he will enter into some agreement, usually oral, with another Japanese for planting and cultivation upon some basis of sharing in the profits when the pineapples are finally disposed of in the market selected by the holder of the land. As to another tract or part of his holdings, another and perhaps an entirely different arrangement will be entered into with still another Japanese. The Pineapple Company buying the harvested fruit knows nothing about what arrangement may have been made by the planter for the growing of his fruit, and consequently all of the contracts, of the character of that now under consideration by this court, will invariably be found to contain a clause which will cover the pineapples proposed to be purchased in the event that they are not grown by the planter but are yet owned by him or their sale and marketing controlled by him. To say that in order to

give meaning to the words "may own or control" we must consider them as applying to pineapples which may come within the control of the planter in the course of time after the execution of the contract, the extent and quantity of which no one could tell, is simply to disregard the obvious meaning of the language and to give it a meaning clearly never intended by the contracting parties.

It is another well-known fact that the designation of localities on the Island of Oahu must necessarily at best be inaccurate. The term "Leilehua", for example, designates a general locality on the Island of Oahu, the exact boundaries of which are at best very indefinite. Just where Leilehua ends and another named locality begins no one can say within any degree of certainty. The only areas which have been surveyed with any degree of accuracy, as subdivisions of the land, are large areas known as "ahupuaas", usually extending from the crest of the mountains to the sea. Consequently, in designating localities, for the purpose of safeguarding the parties in the event that any dispute might arise as to whether or not the place designated has been accurately described, a phrase is very commonly inserted in indentures and contracts of this character, substantially in the language found in this particular contract, namely "or elsewhere on the Island of Oahu". To say, as contended in the appellant's brief, that the words must be interpreted to mean that the parties were contracting with respect to lands which might subsequently be acquired elsewhere, and the extent of which could not possibly be foretold, is to depart from the obvious meaning and

intent of the language and to adopt a construction unnecessary, unreasonable and clearly not within the contemplation of the parties.

The words referred to are furthermore inserted in these printed forms to take care of cases, frequently arising, where a single planter has holdings in various localities only one of which it is convenient to designate specifically, leaving the others to be covered by the general language "or elsewhere on the Island of Oahu".

The Pineapple Company says to the planter:

> "You have certain pineapple holdings at Leilehua, the extent of the crops from which we can very closely estimate. In fact we know that those holdings amount to approximately 150 acres and we have estimated the crops from those holdings at 1500 tons, of which 200 tons will be Class B fruit. We offer to buy the pineapples harvested from those holdings during the next four years. We do not know whether you propose to grow those pineapples yourself or what arrangements you may have made with other Japanese for the planting, cultivation and harvesting of the crops, but we do have every reason to believe that you control the harvests from those lands. Therefore, to make perfectly sure that we will get the pineapples which we are contracting for, and for the handling of which we will make arrangements, we offer to buy not only the pineapples in the event that you yourself grow them, but also in the event that you simply own or control them."

The planter accepts this offer. The parties have no way of knowing what pineapple lands the planter may thereafter acquire or what pineapples he may himself thereafter purchase or bring within his control, and the contract says absolutely nothing about such after-

acquired pineapples. It is, to say the least, highly unreasonable to suppose that, with canneries of definitely limited capacity, and faced with the necessity of definitely determining in advance the extent of its own plantings, and those of independent growers contracted with, will just meet its cannery capacity (Trans. p. 226), the Pineapple Company would deliberately bind itself to buy pineapples to an extent wholly undeterminable and possibly far in excess of what it could handle. The Pineapple Company did not do any such thing, and if there had been an overproduction instead of a shortage after the making of the contract, the Pineapple Company would have been the first to say so, in answer to any attempt to unload on it pineapples acquired after the execution of the contract and clearly not within the contemplation of the parties at the time of the execution of the contract.

When we notice that before the contract was executed by the Pineapple Company and returned to the planter, the company, through its clerk, wrote upon the face of the contract: *"Approximately 150 acres. Approximately 1500 tons (Class B 200 tons)"* (Trans. p. 236), the fact that the Pineapple Company was contracting with respect to that 150 acres only becomes conclusively apparent. This phase of the matter we will consider a little more in detail later, at present we contend that wholly aside from it, it is thoroughly evident that the only reasonble construction to be placed upon the language found in the *clause imposing obligations on the Pineapple Company,* is that the company undertook to purchase only pineapples then owned or controlled or to

be grown on lands then held by the planter, the extent of which could be, and indeed had been, definitely estimated by the contracting parties. If there had been any other intent, it would have been perfectly easy to have expressed it. If the Pineapple Company had intended to contract for after-acquired pineapples, instead of using only the words *"may own"* which obviously speak as of the present only, it would at least have said *"may own or hereafter acquire"*.

Next we have the paragraph setting forth the corresponding agreement of the planter. We submit that there can be no serious question in the mind of anyone carefully considering the language of the contract, but that it was the intent of the user of the language to simply impose upon the planter a corresponding and an identical obligation to deliver and sell what the Pineapple Company had in the preceding paragraph undertaken to handle and buy. In fact, we find that the language of the second paragraph, so far as it concerns itself with designating what pineapples are covered by the contract is substantially identical with the language used in the first paragraph, the only difference being that an abbreviated form of expression is used, and certain modifying and explanatory words are left out.

The following comparison of the language used in the two paragraphs shows how evident it is that the second paragraph is merely an abbreviated form of the first, and that the intent was to impose thereby upon the planter, simply an identical and corresponding obli-

gation with that imposed by the preceding paragraph upon the Pineapple Company, namely the obligation to sell the pineapples to be grown on his then known holdings. We have numbered with the same numbers, those phrases which correspond with each other, and which convey an identical thought in the two paragraphs.

Obligation of Pineapple Company.

(*1* The Pineapple Company agrees that *1*) (*2* during the term of four years beginning May 1, 1916, and ending April 30, 1920, *2*) (*1* it will handle and buy under the conditions as hereinafter detailed, and with such exceptions as are hereinafter stated, *1*) (*3* all the merchantable, smooth, Cayenne Pineapples that may be grown by the Planter on his present holdings at Leilehua, or elsewhere on the Island of Oahu, *3*) (*4* or that he may own or control on the Island of Oahu. *4*)

Obligation of Planter.

(*1* The Planter agrees that he will deliver to the Pineapple Company under the terms and conditions and with the exceptions hereinafter contained, *1*) (*3* all the merchantable, smooth, Cayenne Pineapples that he may grow at Leilehua, or elsewhere on the Island of Oahu, *3*) (*4* or that he may own or control on the Island of Oahu, *4*) (*2* during the term stated. *2*)

Below the phrases of Paragraph 2 are set out oposite the corresponding phrases of Paragraph 1.

Obligation of Pineapple Company.

1 The Pineapple Company agrees that * * * it will handle and buy under the conditions as hereinafter detailed, and with such exceptions as are hereinafter stated,

Obligation of Planter.

1 The Planter agrees that he will deliver to the Pineapple Company under the terms and conditions and with the exceptions hereinafter contained,

2 during the term of four years beginning May 1, 1916, and ending April 30, 1920,

3 all the merchantable, smooth, Cayenne Pineapples that may be grown by the Planter on his present holding at Leilehua, or elsewhere on the Island of Oahu,

4 or that he may own or control on the Island of Oahu.

2 during the term stated

3 all the merchantable, smooth, Cayenne Pineapples that he may grow at Leilehua, or elsewhere on the Island of Oahu,

4 or that he may own or control on the Island of Oahu.

In the first paragraph the Pineapple Company has agreed that during the term of four years, beginning May 1, 1916, and ending April 30, 1920, it will handle and buy certain pineapples to be grown upon certain lands then held or which pineapples were then controlled by the planter. In the second paragraph, the planter has agreed that during the same term, he will deliver those same pineapples to the Pineapple Company.

Were it not for the fact that in the paragraph containing the planter's obligation the phrase "during the term stated" happened to be placed at the end of the paragraph rather than next to the verb which it modifies, it is doubtful if the present controversy would ever have arisen. It is, we believe, only because the phrase referred to was permitted to follow the phrase "or that he may own or control on the Island of Oahu" that the thought could have suggested itself that it might be possible to contend that the phrase "during the term stated" modified the preceding clause from which it

was separated by a comma, rather than the principal verb ''deliver'' corresponding to the principle verbs ''handle'' and ''buy'' which the same phrase modified in the paragraph fixing the obligation of the Pineapple Company.

The whole difficulty has apparently arisen because counsel for the appellant have insisted upon saying that the planter has agreed to deliver all of the pineapples which he may own or control during the term stated, rather than that he has agreed to deliver during the term stated all of the pineapples which he then owned or controlled.

It is submitted that such construction, aside from being entirely inconsistent with the rest of the contract, with circumstances attendant upon the execution of the contract and with reason and practice as indicated by the evidence, is contrary to the fundamental rules of grammatical construction. Had it been intended that the phrase, ''during the term stated'', should modify the verbs, ''own or control'', which immediately precede it, it would not have been separated from them by a comma. This conclusion becomes a practical certainty when it is observed that the corresponding phrase in the paragraph outlining the obligation of the Pineapple Company, namely ''during the term of four years beginning May 1, 1916, and ending April 30, 1920'', was made to modify the principal verbs of that sentence.

B.

The contract taken as a whole clearly refers only to pineapples then owned or controlled or to be grown on lands then held by the planter. Assuming for a moment that the two paragraphs imposing corresponding obligations upon the Pineapple Company and the planter, if taken alone, leave some doubt as to whether the contract is intended to apply to present or future holdings, a consideration of other parts of the contract immediately removes any such doubt.

It is a well established rule of law that a contract must be considered as a whole and that we may not consider this, that, or the other part or paragraph separate and apart from the whole. Counsel for the appellee have quoted in their brief an extract from *13 Corpus Juris* at page 525, setting forth this well-known rule of law, with which statement of law we entirely and heartily agree. The Supreme Court of Hawaii, in its opinion rendered in deciding this case, has laid particular emphasis upon this rule of law as being peculiarly applicable to the problem presented by this controversy (Trans. p. 186).

Assuming, then, that the two paragraphs referred to leave us in some doubt as to whether, for example, the verb ''may'' found in both paragraphs, used to designate pineapples which the planter ''may own or control'', is used in the present or in the future sense, let us see what light is thrown upon the question by other provisions of the contract.

1.

The provision for delivery f. o. b. cars at Leilehua shows clearly that the parties were contracting with respect to the then holdings of the planter, all of which were known to be at Leilehua.

The following provision of the contract shows that the parties had in mind only pineapples to be harvested from the lands then known to be at Leilehua and which pineapples were susceptible of being delivered F. O. B. railroad cars there, and indicates clearly that the parties did not have in mind fruit which might possibly come under the control of the planter in the future at any place on the Island of Oahu:

> "It is mutually agreed that the Pineapple Company will furnish F. O. B. railroad cars at Leilehua, Island of Oahu, lug boxes for the delivery of the fruit, and that the Planter will deliver said fruit F. O. B. railroad cars at Leilehua, Oahu, in said lug boxes, and that said merchantable pineapples will be delivered in such condition of ripeness as may from time to time be required or designated by the Pineapple Company."

We do not believe that we can state our contention in this connection better than by using the language of the Supreme Court of Hawaii. The Chief Justice, speaking of this particular contract, in the opinion of the court, unanimously concurred in, says:

> "Their clear intention, we think, was to enter into a contract with reciprocal obligations on both sides, that is to say, the company was obligated to buy and the Planter was obligated to sell all the pineapples grown by the Planter on his holdings which he possessed at Leilehua or elsewhere on the Island of Oahu at the date of the making of the

contract, the location and extent of which were known to the parties at the time and the area of which was noted in writing upon the contract at the time of its delivery to the Company by one of is representatives as containing 150 acres. The correctness of this intention is made patent when the further clause in the contract which required the Planter to deliver all of said fruit F. O. B. railroad cars at Leilehua, Oahu, is considered. Assume that subsequently to the date of the contract Saito acquired land at Waimanalo or at some other locality remote from and inaccessible to Leilehua and that upon this land he grew and produced pineapples. In that event, if the construction urged by Complainant is to be adopted Saito would be required to deliver pineapples to the Company F. O. B. cars at Leilehua at fourteen dollars ($14.00) per ton, when from the geographical and physical conditions prevailing, which are within the common knowledge of all, the expense of transportation alone would far exceed that amount. In this connection, the rule of reasonableness of construction will apply, the effect of which is that where the language of the contract is contradictory, obscure or ambiguous, or where its meaning is doubtful so that it is susceptible of two constructions, one of which makes it fair, customary and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred. See Leschen & Sons Rope Co. v. Mayflower Gold Mining etc. Co., 173 Fed. 855." (*Hawaiian Pineapple Company. Ltd. v. Masamari Saito et al.*, 24 Haw. 787, 798, Trans. pp. 187-188.)

We contend that the fact alone that there was designated a particular place at which all the pineapples were to be delivered by the planter, shows conclusively

that the parties were contracting with respect to some definite pineapple crop or crops having a definite location. The fact that there was a stipulation that deliveries should be made at a particular place obviously precludes the possibility that they were making a contract applicable to any and all pineapples wherever they might be grown. Surely it is obvious that if the parties had had in mind pineapples which might be grown at Waimanalo, at Kailua, at Kahuhu or at other parts of the Island of Oahu where pineapples are grown but which are distant from Leilehua and separated from it by mountains, there never would have been the stipulation providing for delivery at any particular railroad station. Surely it is obvious that in that event the parties at least would have provided for delivery at other suitable places. We are unable to see how any other conclusion can be reached than that the contract was intended to apply solely to an estimated quantity of pineapples located and to be harvested at a definitely known place.

Counsel for the appellant have stated in their brief that Leilehua, Wahiawa and Pupukea are the only districts on Oahu in which pineapples are grown and which are tapped by the railroad, therefore, they say that the covenant as to the delivery of the fruit at Leilehua is "perfectly reasonable". Their statement, made quite outside of the record, is far from being accurate in fact. Other districts where pineapples are grown and which are tapped by the railroad are Kahuku, Waimea, Kawailoa, Waialee and Mokuleia. Be that as it may, we have certainly never contended that

there is anything at all unreasonble about this provision of the contract. Our contention in fact is that it is highly reasonable, and the only possible provision which we could expect to find in the contract in view of the fact that all of the pineapples contracted for were definitely known by the parties to be at Leilehua. Our contention, further, is that if the Pineapple Company had intended to buy Saito personally as a pineapple getter elsewhere on the Island of Oahu, they would have made some provision which would have made it economically possible for him to be valuable to them in that capacity, or if they wanted to buy all of the pineapples which he could profitably grow and deliver to the railroad, they would at least have made it possible for him to make deliveries at Wahiawa or Pupukea or other stations. It is of course true that many pineapples are grown on Oahu in places inaccessible to the railroad, in which case the transportation to the canneries is handled by motor trucks and other means of conveyance, and we say that if the contention of the appellant were well taken, this fact would likewise have been taken into consideration.

The theory of the appellant that in making these form contracts with pineapple planters, the Pineapple Company was buying men as pineapple getters rather than pineapples, is made the more obviously untenable by a consideration of this particular provision of the contract. If it was the idea of the company to buy all pineapples which Saito could get for it anywhere during the term stated, rather than the pineapples which it knew that he then had under his control, it

surely would never have tied him down to any particular railroad station as a place of delivery. The truth of the matter, of course, is that they were buying pineapples to be grown on a certain 150 acres of land, which land happened to be located at Leilehua, and, therefore, that they provided for delivery of the pineapples to be grown on that land at the railroad station at Leilehua. This particular provision of the contract is only one of the many indications which show beyond question that the contract was intended by the parties and has been expressed by them to apply to pineapples controlled by the planter at the time of the execution of the contract.

We cannot leave this phase of the argument without pausing for a moment to briefly consider the efforts of appellant to get around the obvious conclusion that, by designating as a definite place for the delivery of the fruit the station nearest which the pineapples contracted for were to be grown, the parties have shown beyond question that they had in mind and were contracting with respect to a certain crop of pineapples at that time definitely ascertained. In the first place, on page 21 of their brief, they have offered the curious suggestion that in some way, the manner of which they do not designate, Libby, McNeill & Libby is *estopped* from pointing to the fact that the paragraph in question clearly indicates that the parties had in mind the particular 150 acres known to be located at Leilehua, because the Libby Company have themselves incorporated in their contract for the purchase of the pineapples in question a similar provision for delivery F. O. B. cars at Leilehua. How in the world Libby,

McNeill & Libby can be estopped to urge that the Hawaiian Pineapple Company was contracting only with reference to pineapples grown, owned or controlled on lands known to be held by the planter at the time that its contract was made, by reason of the fact that the Libby Company has subsequently made a contract admittedly applying only to pineapples to be grown, owned or controlled upon lands held by the planter at the time that its later contract was made, we are wholly unable to see. The most casual examination of the contract of April 1, 1918, between Saito and the Libby Company will at once show that Libby was contracting only with respect to pineapples to be grown on lands definitely designated and the extent of which was perfectly ascertained. In fact, the description of the lands to be covered by the Libby contract was in each instance set out definitely by metes and bounds (see pages 81, 82, 83 and 84, Transcript of Record). Libby, McNeill & Libby has never for a moment contended that their contract of April 1, 1918, covers any pineapple lands which may be acquired after the execution of the contract. Of course, Libby's contract contained the clause which protected it in the event that the pineapples were not grown, but were merely owned or controlled by the planter, just as we have indicated is done in the case of all such contracts. And there is also in the Libby contract the clause protecting the company in the event that the designation of the locality where the lands are located may be inaccurate, by the use of the words "or elsewhere". As has been pointed out, these form contracts are prepared for use

among planters who may have lands scattered here, there and everywhere on the Island of Oahu. The designation of localities on Oahu must be at best inaccurate. Here and there upon the map are found names sometimes of railroad stations and sometimes of general localities, the geographic extent of which is in no way determined. It is very difficult to say of any particular piece of land that it lies in any particular named place, and there was no reason why Libby should fail to protect itself in this regard in this particular instance any more than in the case of any other pineapple planting contract. Certainly, there is no possible basis for the suggestion that Libby is estopped by any representation which it may have made to Saito, from freely and fully urging before this court any contention regarding the obligations existing between Saito and the Hawaiian Pineapple Company.

In the second place, on pages 21 and 22 of its brief, appellant urges that Saito would not be "prejudiced" by the provision for delivery at Leilehua for the reason that he probably would not want to grow pineapples on other parts of the island, anyway, for example that it would be highly improbable that he would care to grow pineapples at Waimanalo, suggested as a possibility by our Supreme Court. This suggestion of appellant simply and entirely ignores the argument of the Supreme Court and is, furthermore, based on an assumption for which there is no possible basis. Speaking outside of the record, as counsel have done themselves in this regard, everyone in Hawaii knows that scores of Japanese are reaping large profits in the

growing of pineapples at Waimanalo. How can this court, or how could any court for that matter, say that Saito would not want to engage in that line of business during the four-year period specified? But wholly aside from the question as to whether or not Saito probably would or would not want to grow pineapples at Waimanalo, we have the unanswered argument of the Supreme Court of Hawaii to the effect that to close to a man the door to any line of profitable endeavor is necessarily some hardship, and that courts will invariably construe contracts if possible in such a way as to make them fair, equitable and such as prudent men would ordinarily enter into. Appellant's argument also ignores the contention that as a matter of reason, if the parties had had in mind the possibility that Saito might acquire other pineapple lands elsewhere later, and if they had desired to include other pineapple lands within the operation of the contract, they obviously would have made a provision providing in some way for the contingency contemplated.

In the third place, counsel for the appellant present this argument. They say in substance:

> "if the construction contended for by us is unreasonable because it would make the contract unreasonable and unfair under contingencies which might well arise, still your contention is equally unreasonable because it provides for delivery at Leilehua and it would cover present holdings at Waimanalo."

This argument, we say, is a mere quibble. It absolutely refuses to recognize the facts known to the parties, and known to this court. *There were no present*

holdings at Waimanalo. There was in fact in the contemplation of the parties a definite area of 150 acres known to be located at Leilehua. The parties were contracting with respect to that 150 acres. Indeed, that fact was noted in writing upon the face of the contract itself. The provision for delivery F. O. B. railroad cars at Leilehua was in truth the only reasonable provision which the parties could have made in this respect. We can only suggest that the character of appellant's argument in this connection indicates the weakness of its position.

Finally, appellant offer the contention substantially summed up by the following language found on page 26 of its brief:

> "If he did not care to conduct his business in an ordinarily businesslike manner, as the contract assumed that he would do, then his was the penalty."

Can any court say that there would be anything unbusinesslike in Saito's endeavoring to extend his activities to the extent of engaging in pineapple growing either himself or through others at Waimanalo, at Kahuku, at Waimea, or at other places on the Island of Oahu during the four-year period designated? We do not, furthermore, believe that this court will adopt the view that it was the intent of the parties to this contract to impose any penalty on either of the parties in the event that they might desire to extend their commercial activities. We will indicate later that the law is clearly to the effect that every effort must be made to construe a contract so that it will not bear a construction such as that contended for by the appellant

in this respect. Courts, and particularly courts of equity, look with extreme disfavor upon any suggestion of an attempt to penalize a person for legitimate business endeavor. If it had been a fact that this contract had really purported to say to Saito:

> "During the period of four years you may not extend your holdings to parts of the Island of Oahu remote from Leilehua. During the period of four years your activities must be confined to this little 150 acres concerning which we have contracted with you or to lands in the immediate vicinity."

Then we say that the contract would be such a contract as a court of equity should not enforce by decree or indirectly by injunction, but it was not such a contract, and we contend that our position in this regard is abundantly supported by the plain meaning of the language of the contract and by every legal rule of construction applicable to the case.

2.

The endorsement placed on the last page of the contract by the clerk of the Pineapple Company prior to its execution by the Pineapple Company and delivery to the planter, "Approximately 150 acres. Approximately 1500 tons (Class B 200 tons)", considered as a part of the contract itself. If it is a part of the contract it is decisive of this dispute.

The evidence pertinent to this particular phase of the matter is set forth in the following extracts taken from the statement of the evidence now before this court:

> "The blanks were subsequently filled in by a clerk of the Hawaiian Pineapple Company, Limited, prior to the execution of the contract by the company, and at or about the same time the following endorsement was made upon the contract near the bottom of the last page below the signatures by a clerk of the Hawaiian Pineapple Company, Limited, to wit: '*Approximately 150 acres. Approximately 1500 tons (Class B 200 tons).*' " (Trans. p. 236.)
>
> "In May, 1916, the respondent Saito had smooth, Cayenne pineapples planted on lands described in his two leases from the Oahu Railway & Land Company, Limited. * * * All of Saito's holdings at that time were at Leilehua, Oahu, and comprised approximately 150 acres of arable land" (Trans. p. 228).

The evidence shows that this particular endorsement was placed upon the last page of the contract at about the same time that the blanks in the printed form of the contract were filled in. The evidence further shows that the contract as finally executed by the Pineapple Company and delivered to Saito bore on it the endorsement in question. Under the evidence it may well be contended that this endorsement was actually a part of the contract itself. If this is so, it ends all discussion of the problems presented by this appeal, for it then definitely fixes for the purposes of the contract the extent of the holdings intended to be covered by the contract. It makes impossible the contention that the contract applies to anything but the 150 acres referred to. If the Pineapple Company and if the planter were contracting only with respect to this 150 acres, we have no further problem of construction before us. We contend that by the endorsement just as by filling in

the blanks, the Pineapple Company made complete the contract which had theretofore been incomplete. The company delivered the contract to Saito in its completed form, and thereby indicated to him that they had bound themselves only with respect to the pineapples to be grown on the 150 acres then held by him at Leilehua.

The law in this regard is well stated in the case of *Gray v. Williams,* as follows:

> "The general rule is that if a memorandum written on an instrument in the margin or at the foot is made before or at the time of its execution, it is considered a part of it; and if it affects the operation of the terms of the body of the instrument, it is a material part" (*Gray v. Williams,* 99 Atl. 735 at page 739).

The statement of evidence before this court shows that this memorandum showing the lands and pineapples covered by the contract was made at or about the same time as the blanks in the printed form were filled in, which was prior to the execution of the contract by the Hawaiian Pineapple Company. The evidence shows that the memorandum was made by the clerk of the Hawaiian Pineapple Company authorized to fill out and complete the contract for it. The memorandum is clearly explanatory of the meaning and scope of the contract and definitely defines the pineapples purchased. It explains and effects the operation of the terms found in the body of the instrument, and under the rule of law above set forth, it was a material part of the contract itself. By signing the contract with the blanks *not* filled in and delivering it to the Hawaiian Pineapple Com-

pany, Saito authorized the company to make the contract complete by filling in the blanks and adding such endorsement or memoranda as it might see fit subject to his subsequent acceptance of the contract upon its redelivery to him. The company saw fit to definitely advise Saito that it was binding itself only as to his 150 acres from which it estimated a crop of 1500 tons by an endorsement in writing plainly made upon the face of the contract just below the signatures of the parties.

The rule of law referred to is again set forth in the case of *Wheelock v. Freeman,* as follows:

> "But there is no magic in the word memorandum. And it has often been decided that when words are written on an instrument which qualify and restrain its operation they constitute a part of the contract" (*Wheelock v. Freeman,* 13 Pick. 165, 168).

There are, for example, great numbers of cases involving unsigned memoranda placed upon the backs of promissory notes. It is invariably held that where these memoranda explain or make more complete the terms of the body of the instrument and where they were placed upon the instrument prior to its execution and delivery, they are as much a part of the contract evidenced by the instrument as are any of the terms found over the signature. A number of these cases have been collected in a note appended to the case of *Kurth v. Farmers & Mechanics' State Bank,* 15 L. R. A. N. S. 612. All of these cases proceed upon the theory that it is not a fatal objection to any particular language of the contract, that it happens to follow rather than to precede

the signatures. If the so-called addendum was on the contract at the time of its execution by the party to be bound and its delivery to the other party, as was the case with our contract, then, if it obviously explains or modifies the terms found in the body of the instrument, it is a part of the contract itself. We submit that the phrase, *"Approximately 150 acres. Approximately 1500 tons (Class B 200 tons)"*, placed on the face of the last page of the contract between the Hawaiian Pineapple Company and Saito was as much a part of the contract as were, for example, the words designating the place for the delivery of the fruit, which were placed upon the face of the contract at the same time. If this phrase was a part of the contract, we need go no further, because obviously they definitely show that the contract applied only to the 150 acres, which the evidence shows that Saito then held and that it did not apply to any after acquired lands or pineapples.

Counsel for the appellant in their brief have laid great stress upon the rule of law that a contract must be considered as a whole. With that rule of law we entirely agree. In their brief the only argument which they have predicated upon this rule of law has been the argument to the effect that an imaginary contention, and one not made by the appellees at all, is unfounded. They have said that we contend that the contract covers only pineapples grown by the planter and not those owned or controlled by him and that in considering the contract as a whole it appears in subsequent paragraphs that the pineapples covered by the contract are defined as "pineapples grown, owned or controlled by the planter".

They have gleaned nothing other than this from their consideration of the contract as a whole. In truth, our contention is quite the reverse and accords entirely with the language used in the subsequent paragraphs of the contract and referred to by appellant. Our contention is that the contract covers both pineapples grown by the planter and pineapples merely owned or controlled by him, and further that it is the obvious intent of the language of the contract that it shall apply only to pineapples to be grown upon lands held by the planter or pineapples owned or controlled by the planter at the time of the execution of the contract. It is our contention that the only possible ambiguity in the whole contract is found in the question as to whether the verb "may" used in the phrase "may own or control", is used in the present or in the future tense and we say that the contract considered as a whole clearly shows that it is used in the present tense. It is our contention that a consideration of the contract as a whole, containing as it does a provision for the delivery of the fruit at the station nearest which the lands within the contemplation of the parties were located, and with the exact acreage and probable crop noted on the face of the contract, leaves no doubt but that the contracting parties in using the language which they did use, intended to buy and sell only pineapples to be grown on the 150 acres in question and had no intention at all of purchasing and selling any and all pineapples which Masamari Saito might in any way get under his control upon the whole Island of Oahu during the period of four years.

II.

EVIDENCE OUTSIDE OF THE CONTRACT ITSELF EXPLANATORY OF ITS MEANING. THE EXTRINSIC EVIDENCE.

A.

The circumstances under which the contract was made show clearly that the parties intended to contract with respect to a then definitely ascertained quantity of pineapples.

On page 30 of its brief, appellant has quoted from *Corpus Juris* the very wholesome rule of law that a contract should be construed in the light of the circumstances surrounding the parties at the time of its execution. It is another thoroughly established rule of law that a contract shall be construed if possible so as to make it reasonable and such a contract as reasonably prudent business men would make. With these rules of law in mind, we will consider the facts as shown by the statement of evidence indicating the circumstances under which the contract was entered into.

In May, 1916, after a period of overproduction having extended over two years or more, the canneries, including the cannery of the Hawaiian Pineapple Company, were

> "carrying a heavy stock of canned pineapples from previous years which they had been unable to sell" (Trans. pp. 227-228).

The cannery capacity of the Hawaiian Pineapple Company was and is limited. The company estimates in advance for crops of its own planting in accordance with the extent of the contracts which it makes with independent growers. The period of growth from planting to maturity is from eighteen months to two years.

(Trans. p. 226.) All of these circumstances we contend indicate clearly that the Pineapple Company, acting in a prudent and businesslike manner, would have every reason in the world for knowing in advance exactly the quantity of pineapples which it was purchasing from any particular grower and for contracting with respect to a definitely ascertained quantity of pineapples only. With a large surplus on its hands and faced with the necessity of regulating as far as two years in advance the extent of its own plantings in order to avoid having on its hands more pineapples than its cannery could handle, it would have been the height of folly for the Pineapple Company to have contracted with any planter or dealer for all pineapples which that planter or dealer could get under his control anywhere on the Island of Oahu during a period of four years.

Placing itself as near as may be in the situation of the parties at the time of the execution of the contract, as suggested by the appellant, the court sees this situation existing in May, 1916: The Pineapple Company having decided to make further contracts with independent growers to make up for a deficiency which it had ascertained that there would be during a period of years between the quantity of pineapples which it planned to grow itself and the pineapples which its cannery could handle during that period of years, sent out its agent to make contracts with independent planters for a certain quantity of pineapples here and a certain other quantity of pineaples there until he should have contracted for pineapples to such an extent as would just correspond with its cannery capacity. This

agent came to Masamari Saito with a blank form of printed contract already prepared by the Hawaiian Pineapple Company. That blank form of contract contained the usual stipulations which would protect the company in the event of inaccuracy in the description of the locality and in the event that the planter was not really growing the pineapples which he controlled. The company's agent went over Saito's holdings and found that they comprised approximately 150 acres from which he estimated that the crop would be approximately 1500 tons, of which 200 tons would be Class B fruit. The company's agent agrees with Saito to buy that fruit and Saito agrees to sell it. Saito had no other fruit to sell and no other fruit was within the contemplation of the contracting parties. Upon the closing of the negotiations the blank form of printed contract was presented to Saito and he was asked to sign, which he did. It appears that Saito is a Japanese who does not understand the English language, and whether or not the contract was translated to him, we do not know. In signing the contract in blank, Saito trusted to the Pineapple Company to fill it out and complete it in such a way as to make it express what he understood the contract to be. Under such circumstances, as we will point out later, the law says that in the event of a subsequent controversy the contract shall be construed most strongly against the person dealing in the most advantageous position. The law particularly says that where a contract is prepared entirely by one of the parties and the language used is his language, especially where it is on a printed form,

in the event of a subsequent controversy, the contract shall be construed most strongly against the party using the language employed. After having procured Saito's signature to the contract in blank the agent took it back to the officials of the Pineapple Company, indicated to them that he had purchased the crops to be grown upon a tract of 150 acres at Leilehua which crops would approximate 1500 tons of which 200 tons would be Class B fruit. The clerk of the Pineapple Company thereupon completed the contract by filling out the blanks designating "the name of the place where the lands to be covered by the contract were located" (Trans. p. 236), the date, the name of the planter, his place of residence, the place at which the delivery of the fruit was to be made, and, so that there could be no question, by noting at the end of the contract the exact extent of the lands covered by it and the estimated quantity of pineapples. The officials of the company then having added the crops of this 150 acres toward the total of the cannery capacity which would mark the limit of their contracts with independent growers, signed the contract and it was delivered to Saito in its completed form. We believe that it would be difficult to find a set of circumstances surrounding the execution of a contract which could more definitely indicate an intent to confine its application to a definite subject-matter within the contemplation of the parties at the time of the execution of the contract, than do these circumstances.

Apparently the only argument that counsel for the appellant have predicated upon what they term the

surrounding circumstances is the argument that because the pineapple business was emerging from the precarious situation in which it had been for a number of years, therefore the Pineapple Company would want to buy all of the pineapples which it could possibly get even though their quantity might far exceed what its cannery could handle. In view of what really were the circumstances attendant upon the execution of the contract showing as they do a clear intent to deal with respect to a definitely ascertained quantity of pineapples then controlled by the planter, we do not feel that this argument of appellant is worthy of serious consideration.

B.

The endorsement made on the contract by the Hawaiian Pineapple Company, "Approximately 150 acres. Approximately 1500 tons (Class B 200 tons)", even though considered not an actual part of the contract, is evidence clearly showing the intention of the parties at the time of entering into the contract, to contract with respect to the 150 acres referred to only.

> "Greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. No matter how broad or how general the terms of the contract may be, it will extend only to those matters with reference to which the parties intended to contract."
>
> * * * * * * *
>
> "Contracts must be construed with reference to the intention of the parties at the time of entering into the contract" (13 *Corpus Juris* 523).

In this connection it is our contention that even though the endorsement designating the acreage and the pineapples coverel by the contract be considered not as an actual part of the contract, still the fact that such an endorsement was made upon the contract prior to its execution by the Pineapple Company and prior to its redelivery to the other contracting party, is a fact clearly indicating the intent of the parties, and particularly of the Hawaiian Pineapple Company, which now seeks to repudiate that intent, to confine the contract to the then known holdings of Saito. It shows conclusively the contemporaneous construction placed upon the contract by one of the parties to it and acquiesced in by the other party by performance under the contract after this limitation upon its effect had been called to his attention by the note in writing referred to.

It must, furthermore, be remembered that this particular contract was executed in duplicate (Trans. p. 228). The endorsement in question was made upon the contract; not only upon the copy which was kept by the Hawaiian Pineapple Company, but also upon the copy which was redelivered to Saito. The evidence clearly shows that it was not merely a casual note, and, indeed, even if it had been, its value as indicating the construction placed upon the contract by the Pineapple Company would not have been materially less. The fact that this endorsement was placed upon the contract in writing prior to its execution, and the further fact that the contract was redelivered to Saito with the endorsement clearly upon its face are facts which coincide exactly with the

actual making of the contract itself. They are facts which show the intent of the parties as it then was, and which show the unmistakable construction put upon the contract by one of the parties at the time when evidence of this kind is most valuable, namely, at exactly the time that the contract was made. Counsel for the appellant have seen fit to fail to even attempt to meet appellee's argument based upon the significance of the endorsement in question, although they knew that the appellee has always urged this feature of the matter as being highly significant, and although it is referred to by the Supreme Court of Hawaii in its opinion from which this appeal has been taken. We can only assume that they can find no satisfactory answer to the contention of appellee in this connection. Indeed, we do not see how it is possible to escape the conclusion that the Hawaiian Pineapple Company would never have plainly written on the face of two duplicate copies of a contract language clearly indicating the extent of the lands to be covered by the contract, unless it had been their intent to confine the contract to those lands, and to avoid any question by definitely settling any uncertainty which might exist by virtue of ambiguities in the body of the instrument. We do not feel that it is necessary to cite further law to the effect that facts showing the construction put upon a contract by the parties contemporaneously with its execution are evidence of a vitally important character.

C.

The fact that Saito sold pineapples from a single small twenty-acre lot, a part of the after acquired premises, to the Hawaiian Pineapple Company at the same price as the prices stipulated in his previous contract is of no value as showing any construction placed upon the contract of May 18, 1916. The arguments of appellant relative to the construction of the contract by the parties considered.

Appellant lays particular stress upon the fact that prior to concluding negotiations for the disposition of the pineapples to be grown upon his after acquired premises as a whole, Saito sold the second or third ratoon crop harvested from lot 1, comprising twenty (20) acres, to the Hawaiian Pineapple Company at the same price as the prices stipulated for the crops to be grown on the lands covered by his previous contract with that company. The force of appellant's argument in this connection dwindles into insignificance when we consider the real facts and circumstances. The statement of evidence shows that the only after acquired land which had any harvest at all prior to 1918, when Libby, McNeill & Libby purchased the crops from these after acquired lands, was lot No. 1, one of the six lots comprising the after acquired leaseholds. The statement of evidence further shows that this lot was a tract of only twenty acres and that the crop of 1917 was a second or a third ratoon crop. Just how much twenty acres would yield after the plants had run for two or three seasons we cannot say. We feel safe, however, in suggesting that the quantity would not be large. Furthermore (and this is a fact which appel-

lant has entirely overlooked), it cannot possibly be said from the statement of the evidence that there was at that time any other cannery purchasing pineapples in that locality or anyone else to whom Saito could have profitably disposed of the pineapples prior to the time that Libby, McNeill & Libby entered the field at Leilehua and concluded their contract with him under date of April 1, 1918. Counsel for the appellant say that Saito placed a construction upon the contract by selling pineapples to the Hawaiian Pineapple Company in 1917 at a base price for class A fruit of fourteen dollars ($14.00) per ton, and in not selling to some one else at a higher price, but they do not show that there was anyone else negotiating in the locality to whom he could have sold. Counsel say that it is significant that Saito made no attempt to contract elsewhere for the sale of his after acquired pineapples when the record is absolutely silent in this regard, and so far as this court knows, he may have made every effort, and may indeed have known that Libby, McNeill & Libby would be available as a purchaser later. There certainly was nothing unreasonable in his delaying the making of a contract, disposing of his after-acquired pineapples, when the price of pineapples was rising rapidly and there was no necessity for disposing of any pineapples excepting those from Lot 1, until 1918.

Appellant further offers the suggestion that, because the Hawaiian Pineapple Company loaned money to Saito and took as security for the loan a mortgage on his after-acquired leaseholds, it, therefore, follows that they have construed their contract of May 18, 1916,

to include those after-acquired leaseholds. Such a contention is wholly unwarranted. The fact was that Saito wanted to borrow money, and to whom was it more natural that he should turn than to the Hawaiian Pineapple Company with which he was getting credits from time to time by the delivery of fruit. The Hawaiian Pineapple Company, finding the security perfectly good, and knowing that the loan could be promptly taken up by deliveries of fruit under its existing contract from the lands which Saito then had, thinking doubtless that the pineapples to be grown on the subsequently acquired lands would later be available for it should it see fit to contract for them, made the loan. We see nothing in the placing out of six thousand dollars ($6,000.00) at 8% on perfectly good security, in a short time loan, which would indicate that even at that time the Pineapple Company thought that it had a contract which would cover the after-acquired lands. It is doubtless true that the Pineapple Company figured that, without taking any risk at all it was making available for itself more pineapples which it could later buy if the circumstances justified, or which it could leave if pineapples again became a drug on the market. The trouble has arisen because the appellant failed to negotiate for these pineapples until after they had been purchased by the appellee.

The only other so-called act of the parties construing the contract, which appellant points to, is found in the fact that the Hawaiian Pineapple Company's interpreter testified that Saito had said, at a time

subsequent to the arising of the present controversy, that he thought at one time that the contract with the Hawaiian Pineapple Company did cover after-acquired pineapples. Saito under oath denied that he ever said any such thing. But even if he had said it, of what value would it be under the facts known to the court? Saito, an illiterate Japanese, probably never did have any very definite idea as to the legal scope and effect of the contract into which he entered. Indeed the evidence shows that he signed it in blank, authorizing the Pineapple Company to make it complete, which it did, and the evidence shows that in making it complete, it indicated clearly the lands to which the contract applied. The fact that Saito at some time subsequent to the execution of the contract, through perhaps an imperfect translation and understanding of it, may have arrived at the conclusion that it covered after-acquired pineapples, if indeed it ever was a fact, shows, we submit, literally nothing as to the actual intent of the contracting parties at the time that the contract was made, which is the material thing with which this court is concerned.

It may well be suggested in this connection that the very fact that Saito offered these particular pineapples to Libby, McNeill & Libby at all, is an obvious indication that he must have thought that he had something which he could sell to them.

We respectfully submit, therefore, that there were no acts of the parties extending over a period of two years, or over any period which are in any instance at all inconsistent with the theory that the contract of May

18, 1916, covered only pineapples to be grown, owned or controlled by Saito on the lands which he held at the time of the execution of that contract. We submit, that in truth the action and conduct of the parties after the making of the contract and particularly at the time that it was made, simply aid in making more certain that the obvious meaning of the language of the contract construed in the only way consistent with reason, was indeed at all times the construction which the parties themselves placed upon it.

Of course, in considering any evidence claimed as showing a practical construction put upon the contract by the parties, the following well established rule of law must be borne in mind:

> "But practical construction is not conclusive, and may be considered only when the contract, *considered in the light of surrounding circumstances*, leaves the proper construction in doubt" *(13 Corpus Juris* 548, and cases there cited).

It is our contention that the contract in question considered in the light of surrounding circumstances, leaves no doubt whatever but that it was not intended to cover any pineapples which might be acquired after the date of its execution. Further, even if there had been any doubt, every act of the parties which might in any way be said to show a construction of the contract, removes that doubt and indicates that they were contracting with respect to a definitely ascertained quantity of pineapples to be grown, owned or controlled by the planter upon the 150 acres known to be held by him at the time that the contract was made.

III.

ALL RULES OF LAW GOVERNING THE CONSTRUCTION OF CONTRACTS WHICH ARE APPLICABLE TO THIS CASE CONTRIBUTE TO MAKE MORE SURE THAT THE CONSTRUCTION CONTENDED FOR BY THE APPELLEES IS CORRECT.

In this section of our brief, we propose to briefly refer to those well established rules of construction which are applicable to this case, all of which, it is submitted, support the conclusion that the contract in question properly construed, applied only to pineapples to be grown on the 150 acres then known to be held by Saito.

A.

Where any doubt arises as to the construction of a contract, it must be construed most strongly against the person using the language employed, and this is particularly true in the case of a printed form prepared by one of the parties.

The rule of law referred to is so thoroughly established that we need merely notice it in passing, as indicating that if there really is any ambiguity in the present contract and if there really can be any doubt as to whether the Hawaiian Pineapple Company purchased a definitely known quantity of pineapples or a wholly indefinite quantity of pineapples to be later acquired, then that ambiguity and that doubt must be settled against the Hawaiian Pineapple Company, the user of the language, who prepared the printed form upon which the contract was executed.

This rule of law is set forth in *Corpus Juris* as follows:

"Where a contract is ambiguous it will be construed most strongly against the party preparing it or employing the words concerning which doubt arises."

* * * * * * * *

"The rules just stated are of course peculiarly applicable where the contract is on a printed form prepared by one of the parties" (*13 Corpus Juris,* 545, and cases there cited).

The rule referred to has been variously stated by various courts. The following are a few examples:

"As has been stated, the contract entered into was upon a regular printed form of proposal, prepared and used by the Wolf Company in the sale of its ice manufacturing machinery, and, if there is doubt as to the true meaning of the contract, it should be construed most strongly against the Wolf Company.

In Christian v. First Natl. Bank (8th Circuit) 155 Fed. 709, 84 C. C. A. 57, Judge Van Devanter speaking for the Court, said: 'The language of the agreement is that of the plaintiff and his co-depositors, and, if there be any doubt as to its true meaning, it is both just and reasonable that it should be construed most strongly against them. Noonan v. Bradley, 9 Wall. 394, 407, 19 L. Ed. 757; Texas and Pac. Ry. Co. v. Reiss, 183 U. S. 621, 626, 22 Sup. Ct. 253, 46 L. Ed. 358; Osborne v. Stringhan, 4 Sd. 593, 57 N. W., 776' " (*Mt. Vernon Refrigerating Co. v. Fred W. Wolf Company,* 188 Fed. 164, 168).

And again:

"The language is chosen by the companies for the purpose, among others, of limiting and diminishing their common law liabilities, and if there be any doubt arising from the language used as to its proper meaning or construction, the words

should be construed most strongly against the companies, because their officers or agents prepared the instrument, and as the Court is to interpret such language, it is, as stated by Mr. Justice Harlan in delivering the opinion of the Court in Natl. Bank v. Ins. Co., 95 U. S. 673, 679: 'both reasonable and just that its own words should be construed most strongly against itself' " (*Texas and Pacific Ry. Co. v. Reiss,* 183 U. S. 621, 626).

And again:

> "If there were any doubt as to the construction which should be given to the agreement of the intestate, that construction should be adopted which would be more to the advantage of the defendant, upon the general ground that a party, who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to him; and on the further ground that when an instrument is susceptible of two constructions—the one working injustice and the other consistent with the rights of the parties,—that one should be favored which standeth with the right" (*Noonan v. Bradley,* 76 U. S. 394, 407).

We feel that there can be no question as to the applicability of this rule of law to the present case. The statement of evidence before this court shows that the contract was on a printed form prepared by the Hawaiian Pineapple Company and further that it was completed by words filled in by the Hawaiian Pineapple Company, so that every word used in the contract was used by the appellant. If any doubt exists as to the proper construction to be placed upon the contract, that doubt should and must, we submit, be resolved in favor of the appellees.

B.

Particular language confining or limiting the operation of a contract governs more general language found elsewhere in the contract.

This rule of law is laid down in *Corpus Juris* as follows:

> "The Court will restrict the meaning of general words by more specific and particular descriptions of the subject matter to which they are to apply" (*13 Corpus Juris,* 537, and cases there cited).

The rule is otherwise stated as follows:

> "It is a rule of construction that, if there is a repugnancy between general clauses and more detailed and specific clauses, the latter will govern" (*English v. Shelby,* 172 S. W. 817, 819).

Thus, in the case at bar, if it may be said that the language of the contract is anywhere general enough to include after acquired pineapples, then that general language must give way to the more specific language found in the contract designating "present holdings" and indicating the acreage intended to be covered by the contract.

C.

Where doubt exists, that construction of a contract which will make it reasonable and just should be adopted by the court.

This rule is stated by Page as follows:

> "As between two constructions, each probable, one of which makes the contract fair and reasonable, and the other of which makes it unfair and

unreasonable, the former should always be preferred'' (*Page on Contracts,* 2nd Ed., Vol. 4,, p. 3549, and cases there cited).

This rule of law has been otherwise and very aptly stated as follows:

> ''Moreover, where the language of a contract is obscure or ambiguous, or where its meaning is doubtful so that it is fairly susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally make, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it unusual, unfair, or an improbable contract. See Leschen & Sons Rope Co. v. Mayflower Gold Mining, etc., Co., 173 Fed. 855, 97 C. C. A. 465, 35 L. R. A. N. S. 1; Russell v. Allerton, 108 N. Y. 288, 15 N. E. 391; Jacobs v. Spaulding, 71 Wisc. 177, 361, N. W. 608'' (*Big Muddy Coal & Iron Co. v. St. Louis-Carterville Coal Co.,* 158 S. W. 420, 424 (Mo.).

Numerous other cases might be cited holding to the same effect. The rule of law enunciated is indeed axiomatic. It is our contention that to construe the contract of May 18, 1916, to mean that the Hawaiian Pineapple Company with a limited cannery capacity, had deliberately contracted for any and all pineapples which Saito might in any way get under his control on the whole Island of Oahu during the four-year period, and to construe it further to mean that Saito would be bound to deliver all pineapples which he might thereafter grow, own or control to the Hawaiian Pineapple Company at Leilehua, at whatever economic

loss, would be to construe the contract in such a way as to make it highly unreasonable, unfair and such a contract as prudent men obviously would not make. It is our further contention that the construction contended for by the appellee, namely that the contract was for a definite quantity of pineapples to be grown on the planter's then holdings, known to be at Leilehua, and to be delivered at the railroad station at Leilehua, is a perfectly reasonable construction, and makes the contract such as prudent men would naturally make.

D.

Where part of a contract is printed and another part is in writing, the part in writing must prevail.

This rule of construction is stated by Page as follows:

> "If the contract is written in part and printed in part, as where it has been filled in upon a printed form, the parties usually pay more attention to the written parts than to the printed parts. Accordingly if the written provisions cannot be reconciled with the printed the written provisions control, at least if there is no evidence tending to show that the printed provisions express the real intentions of the parties" (*Page on Contracts,* 2nd. Ed. Vol. 4, p. 3531).

The rule has been otherwise stated as follows:

> "It is a well settled rule of law that if there is a repugnancy between the printed and the written provisions of the contract, the writing will prevail. It is presumed to express the specific intention of the parties. Hagan v. Scottish Ins. Co., 186 U. S. 423" (*Thomas v. Taggart,* 209 U. S. 385, 389).

It is our contention, in this connection, that the written provision designating "Leilehua" as the place at which the lands to be covered by the contract were located, must govern the more general language "elsewhere on the Island of Oahu" obviously inserted in the printed form to provide against inaccuracies in the description of localities, or to provide for the contingency that very frequently a planter would have lands located in several localities, only one of which could be conveniently designated in the contract leaving the others to be covered by the general term "or elsewhere on the Island of Oahu". It is our further contention that the written phrase designating "*Approximately 150 acres. Approximately 1500 tons* (*Class B 200 tons*)", must govern as designating in writing the specific lands intended to be covered by the contract.

E.

Where under a proposed construction of a contract, contingencies might arise which would render performance impossible, that construction cannot be adopted as against a construction where there could be no impossibility of performance.

This rule of law has been stated in *Corpus Juris* as follows:

> "No matter how clear the ordinary significance of the words, it has been held that they must not be given a meaning which when applied to the subject matter of the contract will render performance impossible" (*13 Corpus Juris,* 540).

The rule has been otherwise stated as follows:

> "The intention of the parties must necessarily govern in the construction of all contracts, and it will never be presumed that persons occupying a contractional relation intended that an impossible thing shall be done" (*Bingell v. Royal Ins. Co.*, 87 Atl. 955, 957 Pa.).

If the construction contended for by the appellant were to be adopted namely that the contract applied to any and all pineapples which Saito might in any way get under his control anywhere on the Island of Oahu, then there might well arise a situation under which it would be practically impossible for Saito to perform his part of the agreement. This would occur notably were he to plant or acquire pineapples at points distant from Leilehua, when under the circumstances it would be economically impossible for him to comply with the provision of the contract providing for delivery at Leilehua. On the other hand under the construction contended for by the appellee, no impossibility of performance could conceivably arise, but the performance of the contract would follow naturally the prudent and businesslike intent of the parties.

F.

A contract will be construed if possible in such a way that the obligations and counterobligations imposed will be mutual.

In view of the really unambiguous meaning of the language used in the first paragraph hereinabove referred to, namely the paragraph imposing obligations upon the Pineapple Company, and in view of the unrea-

sonableness of the contention that the words "may own or control" should be read as meaning "may *hereafter* own or control", in their argument before the Supreme Court of Hawaii the appellant took a position which it has now apparently abandoned. Counsel admitted, for the purpose of the argument, that the paragraph referred to applied only to pineapples then owned or controlled by the planter, but they said that the next paragraph imposing obligations upon the planter, bound him to sell more than the previous paragraph had bound the company to buy, namely after acquired pineapples. In other words they said, that the intent was that as to after-acquired pineapples the company would have the option to take or refuse them. To meet the possibility that this argument may again be urged before this court, we merely quote the following well known rules of law:

> "As between two possible constructions, one of which makes the instrument an executory contract and the other of which makes it an option, the Court will prefer the construction which makes it an executory contract, since by such construction mutual rights are conferred upon both parties thereto" (*Page on Contracts,* 2nd Ed. Vol. 4, p. 3547, and cases there cited).

This rule of construction would further militate against that phase of appellant's present argument to the effect that the Pineapple Company would have the valuable right to purchase pineapples which might be grown upon lands distant from Leilehua, whereas there would be no mutually valuable right to Saito to sell those pineapples.

IV.

THE INJUNCTION IN THIS CASE WAS IMPROPERLY ISSUED BY THE TRIAL COURT, BECAUSE IT COMPELLED THE PERFORMANCE OF A CONTRACT FOR THE SALE OF CHATTELS, FOR THE BREACH OF WHICH THE LEGAL REMEDY WAS ADEQUATE.

It is a well recognized rule of law that a court of equity will not by injunction or decree specifically enforce a contract for the sale and delivery of chattels, because the damage which is suffered by reason of the failure to deliver chattels is a damage which may be easily ascertained and which therefore gives the basis for full and adequate compensation at law.

The injunction issued by the trial court in this case contained the following provision:

> "Now therefore, you, the said Masamari Saito, respondent herein, your agents, servants and attorneys, are and each of you are hereby enjoined from delivering to the said respondent, Libby, McNeill & Libby of Honolulu, Limited, *or to anyone other than the Hawaiian Pineapple Company, Limited.* * * *" (Trans. p. 170.)

It will be seen that the injunction was in substance a specific enforcement of the alleged contract to sell and deliver to the Hawaiian Pineapple Company.

> "As a general rule specific performance is not decreed where the subject matter of a contract is personal property; since the compensation which would be recovered in an action at law is deemed to be an adequate remedy for the breach of the contract. *36 Cyc.*, 554, 555."

Appellant has attempted to bring this case within an exception to the general rule above stated, which exists in the case of chattels having a "pretium affectionis"

or peculiar value, which they contend was the case here, because other pineapples could not be purchased, to replace those lost under the alleged contract. Counsel have dwelt at considerable length upon this exception to the rule, entirely losing sight of the fact that the facts of the present case fail to show the existence of the reason for the exception, namely that the case is one in which it is not possible to accurately ascertain the extent of the damage threatened. Their argument is that, because other pineapples cannot be purchased elsewhere, the court should by its injunction specifically enforce this contract, although it is a fact that these pineapples were of no peculiar value to the Hawaiian Pineapple Company, and had indeed already been resold at a definite price, so that the computation of the damage suffered was a mere matter of arithmetic.

By having already resold the pineapples, to compel delivery of which the injunction was asked (Trans. p. 227), the Hawaiian Pineapple Company had definitely placed a price and valuation upon the chattels in question. The following rule of law therefore applies:

> "Where the party who seeks to recover a chattel of such a character that a Court of Equity would ordinarily decree its delivery to him has set a price upon it in dealings with another, the ground of equity jurisdiction fails" *(36 Cyc.,* 556, and cases there cited).

The evidence further shows that the overhead and running expenses of the cannery would be practically the same whether the pineapples, the delivery of which the court of equity was asked to compel, were or were not in-

cluded within the pack. The measure of damages in an action at law could readily have been ascertained. The extent of those damages would have been the profit which would have been made by delivering those pineapples to purchasers who had already contracted to buy them at a definite price, with no additional overhead or running expenses to consider.

The case of *Marthinson v. King,* 150 Fed. 48, is an interesting case in this connection. At first glance it would appear that the facts of the case show a perfect right in the complainant for specific performance of the contract in question, either by decree or injunction. The contract was for the purchase of growing timber situate on certain lands and of a camp outfit and other equipment for placing the timber upon the market. The profits which might be realized from the outfit purchased dependent upon a fluctuating timber market, would be and were to the highest degree speculative and not capable of ascertainment, but, it came to the attention of the court, that as a matter of fact, the purchaser who was before the court seeking specific performance of the contract had already contracted to sell the entire outfit to another person at a definite sum, just as the complainant in the present case had done, with respect to the pineapples in question. It would probably not have been possible for the complainant in that case to have secured just such a lumber outfit anywhere in the world, but that fact did not give the court any particular concern. As soon as it became apparent to the court that the damage had been substantially fixed by the resale at a definite figure, the court held

that it was beyond the jurisdiction of the court as a court of equity to compel the performance of the contract, inasmuch as the remedy at law was ample and adequate.

The court in that case says in part:

> "King, who had the title to the property, sold or agreed to sell it to Marthinson, the plaintiff, for $1000 cash, the remainder of the price to be paid later. * * * Marthinson at the same time extended the Company's option, and sold, or agreed to sell the property at a larger price to the Company. * * * The result of the performance of both agreements would have been that the Company would have had the title to the property and Marthinson would have made the difference between what he paid King and the larger price which he received from the Company.
>
> * * * * * * *
>
> What he really was entitled to was the amount of his damages—his lost profits—taking the averments of the bill as true. Both defendants being solvent, his remedy at law was ample and adequate when the bill was filed." *(Marthinson v. King,* 150 Fed. 53, 54.)

The following quotation from *Equitable Gas Co. v. Baltimore Coal Tar etc. Co.,* 63 Md. 285, is particularly applicable here:

> "The question then arises whether the contract is of such a nature that a Court of Equity will specifically enforce it; for it seems to be a well settled general rule that *the Court will not interfere by injunction to restrain the breach of a contract for the sale and delivery of chattels which it could not specifically perform.* In such a case the party injured by the breach of a contract is left to his remedy at law" *(Equitable Gas Light Co. v. Baltimore Coal Tar and Mfg. Co.,* 63 Md. 285).

Appellant lays particular stress upon the holding of the court in the case of *Curtice Bros. Co. v. Catts,* 66 Atl. 935; 72 N. J. Equity 831. The facts of that case, so far as the questions under consideration are concerned, are entirely different from the facts in the present case. In that case there was nothing to show that any valuation had been placed upon the chattels to compel the delivery of which the action was brought. There was no evidence showing or from which a court could possibly have determined what profits would be lost if the purchaser did not get the chattels alleged to have been contracted for. The whole reason which makes the case at bar one in which the damage suffered could have been easily ascertained, was entirely lacking in that case, which was simply the case of an alleged contract for the purchase of chattels of a peculiar value because they could not be purchased elsewhere.

We have examined the other four cases cited by appellant in this connection namely, *Gloucester Isinglass & Glue Co. v. Russian Cement Co.,* 154 Mass. 92; *Vail v. Osborne,* 174 Pa. St. 580; *Mutual Oil Co. v. Hills,* 248 Fed. 257; and *Maloney v. Cressler,* 236 Fed. 636. No one of them has facts similar to the facts in the present case. In no one of them had the damage which would be suffered by failure to get the commodities alleged to have been contracted for, been definitely ascertained by a resale of the commodities at a definite price.

The only other item of so-called speculative damage not capable of definite ascertainment at law, to which appellant points, is the damage which it claims the Pineapple Company would suffer from failure to make

full delivery to its customers. We have no quarrel with the law laid down by the cases cited by counsel in this connection, but the facts of the present case wholly fail to bring it within the operation of the rule referred to. The evidence shows that in the year in which appellant's bill of complaint was filed, the Hawaiian Pineapple Company had contracted to sell 251,301 cases of pineapples more than it had estimated that it would have available for sale (Trans. p. 227). It is, therefore, evident that the Hawaiian Pineapple Company was not going to be able to fully fill its orders, wholly irrespective of whether or not it got the pineapples from Saito's after-acquired lands. It further definitely appears from the evidence that the customers of the Hawaiian Pineapple Company were fully advised of the fact that they probably would not get all of the pineapples that they had contracted for and indeed that a provision had been inserted in all of the contracts with these purchasers, definitely providing for that contingency by a prorating of the fruit among the various customers (Trans. p. 242).

There is nothing, we submit, to show that the appellant could not have been fully compensated in an action at law for the alleged breach of the contract. There was, therefore, an entire lack of facts necessary to give a court of equity jurisdiction.

V.

THIS COURT IS WITHOUT JURISDICTION TO HEAR AND DETERMINE THIS APPEAL, BECAUSE THE JUDGMENT AND DECREE OF THE SUPREME COURT OF HAWAII APPEALED FROM WAS NOT FINAL.

The point here raised was heretofore considered by this court on the hearing of appellant's petition for an injunction pending the appeal (260 Fed. 153). We are asking the court to reconsider this question, because, on September 7, 1920, this court decided the case of *Rumsey v. N. Y. Life Ins. Co. et al.*, No. 3444, holding that no appeal would lie from the decree in that case, because it was not final, and the decree in the case at bar is practically the same, in this particular, as the decree in the *Rumsey* case. The two decrees, in this connection, are as follows:

Decree In Rumsey Case Held Not Final.	Decree Appealed From In Present Case.
Cause remanded to the Circuit Judge "for such further action compatible to the decision as may be necessary".	Lower Court instructed "to dismiss the complainant's bill of complaint filed therein, and to take such further or other proceedings prior or subsequent to the dismissal of the bill as may be consistent with the opinion of this court in said cause" (Tr. p. 191).

In the *Rumsey* case this court held that the form of the decree was conclusive as to its finality, and that the decree of the Supreme Court of Hawaii was not a final decree, within the meaning of the statute conferring appellate jurisdiction. After carefully considering the cases, to the effect that the form of the decree must be

looked to in determining the question of its finality, this court said:

> "Compelled, as we are, by the force of these decisions to look at the form of the decree herein for the purpose of determining the question of its finality, we find that it is a decree which reverses the judgment of the Circuit Court and remands the cause for further proceedings in harmony with the Supreme Court's opinion. It follows that it was not final. Haseltine v. Ct. Bk. of Springfield, 183 U. S. 130; Schlosser v. Hemphill, 198 U. S. 173. * * * The appeal is dismissed."

It may, furthermore, well be suggested that, even if this court were not to apply the rule laid down by it in the *Rumsey* case, but were to hold that something further than the form of the decree should be looked to in determining its finality, it would, nevertheless, now definitely appear from the record before the court that *further proceedings* were contemplated in this case in the trial court, other than the mere entry of a decree dismissing the bill. It is apparent from the record that proceedings will, if the judgment is affirmed, have to be had in the lower court for the assessment of damages under the bond filed upon the issuance of the temporary injunction. In those proceedings various questions may well arise which would have to be made the subject of a second appeal, before the rights of the parties could be finally adjudicated. We, therefore, submit that the decree appealed from clearly is not final.

CONCLUSION.

It is respectfully submitted that, independently of the question of the jurisdiction of this court to entertain this appeal, the decree of the Supreme Court of Hawaii should be affirmed for the following reasons: *First,* because, as heretofore concluded by this court, the contract in question, by its unambiguous language, clearly had no application to pineapples or pineapple lands which might be acquired by the planter after the execution of the contract, and not within the contemplation of the parties at the time that the contract was made; *second,* because, even if there were any ambiguity in the language of the contract itself, the circumstances surrounding its execution, and the acts of the parties placing construction upon it, indicate an intent to contract with respect to crops of pineapples then definitely ascertained; *third,* because every rule of law governing the construction of contracts favors the construction contended for by the appellees; and *finally,* because, there having been an adequate remedy at law, the trial court was without jurisdiction to grant injunctive relief.

Dated, San Francisco,
October 14, 1920.

Respectfully submitted,

THOMPSON, CATHCART & LEWIS,
BARRY S. ULRICH,
Solicitors for Appellees.

PILLSBURY, MADISON & SUTRO,
L. G. MCARTHUR,
Of Counsel.

No. 3374

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HAWAIIAN PINEAPPLE, COMPANY, LIMITED (a corporation),

Appellant,

vs.

MASAMARI SAITO and LIBBY, McNEILL & LIBBY OF HONOLULU, LIMITED (a corporation),

Appellees.

ORAL ARGUMENT OF EDWARD HOHFELD ON BEHALF OF APPELLANT.

FILED
OCT 28 1920
F. D. MONCKTON,
CLERK.

No. 3374

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HAWAIIAN PINEAPPLE, COMPANY, LIMITED (a corporation),

Appellant,

vs.

MASAMARI SAITO and LIBBY, MCNEILL & LIBBY OF HONOLULU, LIMITED (a corporation),

Appellees.

ORAL ARGUMENT OF EDWARD HOHFELD ON BEHALF OF APPELLANT.

(OCTOBER 18, 1920.)

May it please the court: plaintiff and appellant in this case, the Hawaiian Pineapple Company, Limited, whom I shall hereafter call the Pineapple Company, is a canner of pineapples in the Hawaiian Islands; respondent Saito is a Japanese, independent grower of pineapples there; and respondent, Libby, McNeill & Libby of Honolulu, Limited, whom I shall hereafter call the Libby Company, is also a canner of pineapples there, and is one of the three

or four companies competing with the Pineapple Company.

On the 18th of May, 1916, the Pineapple Company made a contract in writing with Saito for the sale of certain pineapples that Saito might grow upon the Island of Oahu for the period of four years from the date of the contract.

It is the contention of the Pineapple Company that Saito was obligated to sell not only the pineapples which he grew on his then present holdings, situated in the district of Leilehua, where he resided, but also all pineapples that Saito might grow on subsequently acquired lands during the period of his contract.

It is the contention of Saito and of the Libby Company, on the other hand, that only those pineapples are included in this contract which Saito might grow during the period of four years on the holdings which Saito had at Leilehua at the time when he entered into this contract.

The proper interpretation of this agreement between the Pineapple Company and Saito is the main, if not the only, question in the case.

Passing, for the time being, the discussion of this question, let us proceed with the historical narrative of the case.

Within a very few weeks after Saito had made this contract of May 18, 1916, with the Pineapple Company, he acquired two other leasehold interests. His present holdings at the time that he made the

contract consisted of two leasehold interests acquired from the Oahu Railway & Land Company, and consisted of about 150 acres of arable land, and the two subsequently acquired leasehold interests which consisted of approximately 57 acres of arable land, were also obtained from the Oahu Railway & Land Company, and were also situated at Leilehua. A part of the 57 acres embraced within the two subsequently acquired leaseholds had previously been planted to pineapples, and in consequence there was a certain amount of pineapples which were ready for delivery during the years 1916 and 1917 from these subsequently acquired lands. A part of the acreage, however, had to be planted to pine, the fruit of which would be ready for delivery some two or three years thereafter, since it takes a pineapple from eighteen to twenty-four months to mature.

The record shows that Saito, without objection, delivered the pineapples from the subsequently acquired lands for nearly two years after he entered into his contract with the Pineapple Company, and the latter paid him the same price for these pineapples as it did for the pineapples grown on his other two leaseholds which he held at the time the contract was made, this price being the one named in his contract. This fact is important, because the evidence shows that pineapples became worth more and more as time went on, because of the increased demand for the fruit. Saito continued, as I say, to make these deliveries of pineapples from his subsequently acquired lands until the 1st day of

April, 1918, when the Libby Company approached Saito and offered him $1.50 more per ton for his pineapples. Saito then claimed he was not obligated to deliver the subsequently acquired pineapples to the Pineapple Company, and accordingly made a contract with the Libby Company under date of April 1, 1918, and proceeded to make delivery of these pineapples to the Libby Company.

The pineapple market was such at the time that pineapples were extremely scarce. The canners could not secure as many pineapples as they needed in order to fill their current orders, and, relying on this fact, that other pineapples were not obtainable in the market, an injunction was sought by the Pineapple Company to restrain Saito from delivering any more of these pineapples to the Libby Company. The Circuit Court held that a proper case was presented for the exercise of the equitable jurisdiction of the court, and construed the contract as including pineapples produced from the subsequently acquired lands, and hence granted an injunction, both temporary and permanent.

On appeal, the Supreme Court of Hawaii, while also holding that it was a proper case for the exercise of the equitable jurisdiction of the court, construed the contract as not including pineapples grown on the subsequently acquired lands, and dissolved the injunction and dismissed the case.

An appeal was promptly prosecuted from the decree of the Supreme Court to this court, and ap-

plication was made to this court for the continuance of the injunction while the appeal was pending, so that the subject matter of the suit might not be entirely lost, as it would necessarily be if the injunction were not kept in force. A temporary restraining order was issued by this court, but after argument (the record of the pleadings and evidence not being at that time before the court, but only a copy of the contract) this court held that the construction of the contract by the Supreme Court was correct and that the contract did not include pineapples grown on the subsequently acquired lands, and dissolved the temporary restraining order and denied an injunction pending this appeal.

(Hawaiian Pineapple Company v. Masamari Saito and Libby, McNeill & Libby, 260 Fed. 153 (August 21, 1919).)

The main point of appellant's opening brief is this—that, admitting that the contract considered by itself may be ambiguous, the evidence which is now before the court, showing the surrounding circumstances of the subject matter and of the parties at the time that this contract was entered into demonstrates that the construction contended for by the appellant is the correct one, and that the evidence will further show that the practical construction of the contract by the parties was in strict accordance with the meaning of the contract as contended for by appellant.

I will therefore ask the indulgence of the court while I call to its attention a few of the salient

points in the evidence showing the surrounding circumstances.

Saito is an independent grower. He has been planting pineapples for ten or twelve years past at various places on the Island of Oahu, and since February, 1913, at Leilehua on lands leased to him by the Oahu Railway & Land Company. During 1914 and 1915 the pineapple industry, due to under consumption, had been disastrous to the independent growers because of the prevailing low prices, and there were several thousand tons of fruit ripening in 1915 which were not covered by contracts with canners, either through failure of the growers to accept the contracts offered them, or because they had been unable to make contracts—an exceptional condition—and which fruit the growers were willing to sell for almost any price. Pineapples sold, in 1915, for as low as $5.00 per ton for the large fruit—some at $8.00 per ton. In Saito's contract with the Pineapple Company the price for 1916 was $14.00 per ton, with a provision for an increase of price for the succeeding years according to a certain schedule named in the contract. In May, 1916, the pineapple business was just emerging from this period of depression. The Pineapple Company thought it saw daylight ahead, with an increasing demand, and decided that it was wise to make contracts with such growers as it was able to contract with for a period covering several years ahead. The grower always contracts ahead and the canners always make provision for their packs by contracts

for from one to five years. This has been customary with both planter and canner for the past fifteen years. In May, 1916, Saito had pineapples planted on lands under two leases from the Oahu Railway & Land Company, which consisted of about 150 acres of arable lands, these leases having from nine to ten years yet to run. All of Saito's holdings at that time were at Leilehua, Oahu, where Saito resided, and consisted solely of these 150 acres of arable land embraced within these two leaseholds. Saito had no other holdings elsewhere than at Leilehua, nor did he own or control any lands or pineapples anywhere in the Island of Oahu save the 150 acres aforesaid. At about the same time that the contract was executed, the following endorsement was made by a clerk of the Pineapple Company upon the contract, near the bottom of the last page, below the signatures of the parties: "Approximately 150 acres. Approximately 1500 tons. (Class B 200 tons)." Saito in his answer (Transcript, p. 137) says that when the representative of the Pineapple Company called on him to execute the contract of May 18, 1916, he asked Saito how many acres he then had and what it would produce, and Saito told him he had 150 acres at Leilehua.

These, then, are the salient points in the evidence showing the surrounding circumstances. The evidence shows that the situation of the pineapple industry at that time (in 1916) was such that growers who had been unable to sell their pineapples just previously for even $5.00 to $8.00 per ton,

were now offered from two to three times that amount. It may be fair to presume that Saito as such grower was very anxious to grow as many pine apples during the period of this contract as possible, in order to have the advantage of this new and high level of prices. It may also fairly be presumed on behalf of the Pineapple Company, since it was willing to pay the $14.00 per ton, that it thought it saw daylight ahead and that it was anxious to get control, through contracts, of as many pineapples as possible for the next few years, and the evidence further shows that all that Mr. Saito had at the time by way of present holdings, whether of lands or pineapples, consisted of the lands embraced within these two leases situated at Leilehua, where he resided, and that, at that time, he had no holdings elsewhere, anywhere in the Island at Oahu.

With these points of evidence in mind, I will ask the court to consider the contract itself, and first let us turn to the obligation of the planter, since it is the obligation of the planter which the Pineapple Company is endeavoring to enforce in this suit. At the top of page 6 of Appellant's Opening Brief, the obligation of the planter is set forth. It reads as follows:

> "The planter agrees that he will deliver to the Pineapple Company under the terms and conditions and with the exceptions hereinafter contained, all the merchantable Smooth Cayenne pineapples he may grow at Leilehua, or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu, during the term stated."

The first point to which I wish to call the court's attention, in view of the argument of the other side, is this, that the words "at Leilehua" are a locative ablative, as it were, and constitute an adverbial phrase modifying "grow"; that the words "elsewhere on the Island of Oahu" modify "grow"; that the words "that he may own or control on the Island of Oahu" refer back to the only antecedent, "pineapples"; thus the obligation is to sell *pineapples that he may grow at Leilehua, pineapples that he may grow elsewhere on the Island of Oahu, or pineapples that he may own or control on the Island of Oahu,* during the term stated.

It is an admitted fact in this case that some Japanese planters not only grow pineapples, but they make arrangements with other Japanese to grow pineapples for them, and thereby they own and control them and are able to contract with reference to them, with canners. The last clause respecting pineapples that he might own or control was added, no doubt, to cover not only the pineapples which he might technically himself grow, but that he might own or control through his dealings with other Japanese growers.

The second point I will call the court's attention to, is that the words "may grow" and "may own or control" imply futurity. It is the pineapples which, *during the term of the contract,* the planter may grow, or own or control, not merely the pineapples he happens to be growing at the very time the

contract was signed. Into the obligation of the Pineapple Company the respondents propose to insert the word "now", so as to give the words "that he may own or control in the Island of Oahu" a present tense (Respondents' Reply Brief, p. 10). Yet we have seen that in the unambiguous obligation of the planter, futurity is clearly implied. In order to preserve the balance and harmony between the two mutual obligations of the parties, futurity must be imported into the verbs in both obligations, that of the planter and that of the Pineapple Company. Although respondents must admit, as indeed the Supreme Court held, that futurity is clearly implied in the verbs contained in the planter's obligation, respondents and the Supreme Court have imported the present tense into the verbs appearing in the obligation of the Pineapple Company.

The third point I will call the court's attention to is that the words "present holdings" may be added after the word "Leilehua" without in anywise changing the meaning or scope of the planter's obligation. The sentence would then read as follows: "Pineapples he may grow at Leilehua, on his present holdings, or (which he may grow) elsewhere on the Island of Oahu, or (pineapples) that he may own or control on the Island of Oahu, during the term stated."

The argument of respondents to the effect that in the obligation of the Pineapple Company which we will presently call to the attention of the court,

the words "elsewhere on the Island of Oahu", and "that he may own or control on the Island of Oahu", refer to "present holdings", and not to "pineapples", is based solely on the fact that in the preceding paragraph of the contract containing the obligation of the Pineapple Company, the words "present holdings" are inserted before the word "Leilehua". Yet if in the obligation of the Pineapple Company these words be inserted after the word "Leilehua", no possible ambiguity would remain. Therefore, by the introduction of the words "present holdings" after the word "Leilehua" in the obligation of the planter, we do not thereby make the word "elsewhere" modify "present holdings", or the words, "that he may own or control", modify "present holdings", as suggested by respondents.

Let us next consider the obligation of the planter *in the light of the evidence.* It is an admitted fact that the parties knew that all holdings that Saita had at that time consisted of the 150 acres at Leilehua. Is it possible that the parties would add the words "or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu, during the term stated", if it had been their intent to contract only with reference to definitely known holdings at the time of the contract, which they knew were located at Leilehua and nowhere else? It would seem that the addition of these words furnishes a conclusive answer to the above question, when the evidence showing the surrounding circumstances is considered.

There is no contention that this language in the obligation of the planter, considered by itself, is at all ambiguous, and the Supreme Court held that the obligation of the planter, considered by itself, was broad enough to include pineapples grown on subsequently acquired holdings (Transcript, p. 187).

With this observation in mind respecting the grammatical construction, and the logical and natural meaning, of the planter's obligation, let us now turn to the paragraph of the contract containing the obligation of the Pineapple Company, which is quoted in Appellant's Opening Brief at the bottom of page 5 and the top of page 6. It is as follows:

> "The Pineapple Company agrees that during the term of four years beginning May 1, 1916, and ending April 30, 1920, it will handle and buy under the conditions as hereinafter detailed, and with such exceptions as are hereinafter stated, all the merchantable Smooth Cayenne pineapples that may be grown by the planter on his present holdings at Leilehua, or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu."

It is the contention of the appellant that in the obligation of the Pineapple Company the words "elsewhere on the Island of Oahu" modify "grow", and not "present holdings", and that the words "that he may own or control on the Island of Oahu" modify "pineapples" and not "present holdings". Respondents contend, on the other hand, that this obligation must be read as follows: "All pineapples that may be grown by the planter on his *present*

holdings at Leilehua, or *on his present holdings* elsewhere on the Island of Oahu, or *on his present holdings* that he may *now* own or control on the Island of Oahu''. If we had only the obligation of the Pineapple Company before us, I admit that there would be some basis for that construction. Far be it from me to say that considered by itself, that is not a possible construction of this clause. But I ask the court if the construction which appellant contends for, even without regard to the other parts of the contract, is not equally as possible a construction as that contended for by respondents. The question is, what is the proper construction, and, in the light of the evidence, the necessary construction?

The construction contended for by respondents is not correct, we submit, for the following reasons: In the first place, such a construction is out of harmony with the clear and unambiguous language contained in the obligation of the planter. In our consideration of the obligation of the planter we saw that without any ambiguity the word ''elsewhere'' was an adverbial modifier of ''grow'', and that the words ''that he may own or control'' refer to ''pineapples'' and not to ''present holdings''. Since the language in the obligation of the Pineapple Company is susceptible of the same identical construction as is demanded in the case of the obligation of the planter, is it not the natural and obvious thing for the court to construe the obligation of the Pineapple Company so that its construction

will harmonize with, and not contradict, the unambiguous language in the planters obligation?

In the second place, if futurity must be imported into the words "may grow" and "may own or control", in the planter's obligation, the same construction should be given to the verbs in the obligation of the Pineapple Company, and not the "present tense", as suggested by respondents (Reply Brief, p. 10).

In the third place, the construction contended for by respondents would make redundant the words "present holdings that he may own or control on the Island of Oahu", since Saito's present holdings would necessarily be already covered by the words "present holdings at Leilehua or elsewhere on the Island of Oahu".

Again, in three subsequent paragraphs of this contract which have been set forth in the Opening Brief of the Appellant, at pages 17 and 18, the Pineapple Company made provision that in case of the destruction of its factory by fire, or in case of strikes or riots, it might temporarily be relieved from its obligation to take the pineapples. How have the parties defined the obligation of the Pineapple Company, *"all obligation on the part of the Pineapple Company* to pay for any *pineapples grown, owned or controlled* by the planter"? According to the construction of the Supreme Court and according to the contention of respondents, there are no pineapples provided for in the obligation of the Pine-

apple Company, except pineapples *grown* by the planter on his present holdings at Leilehua, or *grown* on his present holdings elsewhere on the Island of Oahu, or *grown* on his present holdings which he may now own or control on the Island of Oahu. And yet in these three paragraphs we have the parties themselves defining the construction of the obligation of the Pineapple Company as being that of furnishing pineapples *grown, owned or controlled* by the planter. I want to say in passing that this provision of the contract apparently was not called to the attention of the Supreme Court in the argument there. An examination of the briefs fails to show that this language was considered by the Supreme Court. I do not know whether it would have made any difference, but it occurs to me that it might well have raised some considerable doubt in the mind of the Supreme Court as to the correctness of the construction which that court placed upon the contract, to the effect that "elsewhere" modifies "present holdings", and that the words "that he may now own or control" modify "holdings" instead of "pineapples".

Again, if it was the intention of the parties to contract with reference to pineapples only on present holdings at the date of the contract, and since it appears without conflict in the evidence, that all that Saito had at the time was 150 acres and that the Pineapple Company expressly asked him how much his present holdings were, and that he told them only those 150 acres, what meaning can be given to the

rest of the paragraph which, as respondents contend, includes "present holdings elsewhere on the Island of Oahu"—which admittedly Saito had not at the time—or "present holdings that he may own or control on the Island of Oahu"—which admittedly Saito had not at the time? Would not those words be meaningless if the contract was construed as present holdings at Leilehua, or present holdings elsewhere on the Island of Oahu, or present holdings that he may own or control on the Island of Oahu during the term stated.

We have here two clauses in the contract, namely, those of the planter and of the Pineapple Company, which contain reciprocal obligations. The planter's agreement is perfectly free from ambiguity and means exactly what the appellant contends for. There is some ambiguity in the obligation of the Pineapple Company considered by itself, yet if the two mutual obligations can be so read together and construed as to give meaning and force and effect to every clause of the agreement, and bring the two mutually interdependent obligations into harmony and balance, I ask the court if it is not the more natural construction to read the ambiguous portion in the light of the unambiguous portion, and not vice versa, which would result in wrenching the language of the obligation of the planter from its setting and give it an entirely different construction than is required by its wholly unambiguous language.

Judge HUNT. Was there any evidence tending to show that the planter was a sort of broker, endeavoring to buy pineapples, or was he merely a planter, growing on his own places, for sale?

Mr. HOHFELD. The evidence shows that he was an independent grower; that he had, before the making of this contract grown pineapples for several years, on different parts of the Island of Oahu. The appellant says in its brief, and I take it that it is substantially so, that many growers make a practice of not only growing pineapples themselves, but of contracting with other Japanese to grow pineapples for them. I do not think the evidence shows anything more than that. I do not think Saito is anything more than a mere grower, who may have had some sort of loose relationship with other planters whose output he might control. He might be called a boss grower. I think that is about the most the evidence shows. I do not think he was a broker at all. Does that answer the question of your Honor?

Judge HUNT. In getting at the meaning of the word "control", I had in mind where the evidence would appear to justify the construction that at the time the parties made the contract they had in mind that he might be a man who would go out and control, although he did not grow, the pineapples that he might control or dispose of.

Mr. HOHFELD. In the brief of the appellant they take the position that he was not a broker; that

he was one of the class with whom it was customary to go out and make arrangements with other growers and get options on other pineapples, and thus control them; that it was for that reason that that clause was put in. I think that is correct. Both parties seem to agree, so far as that goes, as to what those words, "own or control", mean.

It occurs to me, therefore, that in the light of the intrinsic evidence furnished by the four corners of the contract itself, that the construction contended for by appellant is the proper one, not only because the obligation of the Pineapple Company had thus been defined by the parties themselves, as we have seen from the parts of the contract quoted on pages 17 and 18 of appellant's opening brief, as meaning pineapples *grown, owned* or *controlled* by the planter, but also under the construction contended for by respondents, the words suggested by respondents, "present holdings that he may (now) own or control on the Island of Oahu", would be meaningless and redundant. The other side, furthermore, in order to make good their point, have to import the present tense into the words "may own or control", whereas admittedly it must be the future tense in the obligation of the planter. And if any doubt remains, from a consideration of the contract alone, we submit that when read in the light of the evidence of the surrounding circumstances, all possible ambiguity is removed.

Passing now from a consideration of the intent of the parties at the time of entering into this con-

tract, let us see what the practical construction of the contract was. What was the subsequent history of the parties in dealing with this contract and the subject matter thereof? If the contract meant what Saito and the Libby Company contend for, would it not be fair to assume that when Saito came into control of, or grew pineapples, on the subsequently acquired leaseholds a few weeks afterwards, when the evidence shows that the pineapple market was steadily rising, and that pineapples were getting worth more and more as time went on, would it not be a fair assumption, I say, to think that Saito would either have offered these pineapples to the Pineapple Company at the increased price, or, if the Pineapple Company would not take them at that price, Saito would have sought elsewhere and sold them to another Company? But Saito did not do anything like that. The pineapples from his subsequently acquired leaseholds he sold to the Pineapple Company at the price named in his contract, and continued to do so until he was tempted by the offer of the Libby Company on the 1st day of April, 1918, when he was offered $1.50 per ton more for these pineapples.

Furthermore, the evidence shows that a part of these 57 acres of the subsequently acquired leaseholds had to be planted to pineapples. Saito had to go to considerable expense to plant the pines, which would not mature for from eighteen to twenty-four months thereafter. This was a matter of considerable expense. The evidence shows that it was the in-

variable custom of the planters, before they would plant and grow, to connect up with some of the canners. The evidence is that Saito himself was not a canner. It was the invariable custom of those planters to make arrangements with a canning company for the sale of their product, so that they would not be at the mercy of, perhaps, a falling market. But Saito did not make any new arrangements either with the Pineapple Company or with any other pineapple company, with reference to the pineapples which would be planted and which would mature and be ready for sale during the next four or five years. The Pineapple Company received and paid for these pineapples at the same price provided for by the original contract, although Saito might have sold them to other companies for a higher price. But, more than that, for the second of these leaseholds which he acquired in the early part of August, 1916, Saito needed $6000 to enable him to buy it. He did not have the money. To whom did he apply for the $6000? To the Pineapple Company, and the Pineapple Company loaned him the $6000, so that he might acquire the second leasehold interest. Did the Pineapple Company intend to loan Saito $6000 to raise pineapples for a rival company, when pineapples were so scarce in the Hawaiian market? If there had been any doubt in their mind that these pineapples were covered by their existing contract, would they not have covered those pineapples by the mortgage? They took the leasehold itself as security, but they did not cover these pineapples by

the mortgage. Neither did they make, or insist on Saito making, any new contract with them, providing for the delivery to them of pineapples grown on this leasehold for which they lent the $6000. Yet if they had not believed that they were already legally entitled to these pineapples under the terms of their contract, would it not have been the ordinarily prudent and business-like thing for the Pineapple Company to have insisted, as one of the conditions for the loan, that Saito make a supplemental contract with them for the delivery to them of these pineapples? But no; the Pineapple Company was so anxious to increase its receipt of pineapples that it was willing to loan the $6000 so that he might acquire the leasehold interest. They loaned that money for a year. It was payable on the 10th of August, 1917, a year after Saito acquired the leasehold interest. What does Saito say as to this matter? Simply, "I just continued to give these pineapples to the Pineapple Company because I owed them some money and I wanted to get rid of my debt as soon as possible." But is there any inherent verity in his statement? If he had sold these pineapples to others he would have received even more money in the same length of time, and would have been able to discharge his obligation to the Pineapple Company the sooner. But more than that, on August 10, 1917, he had this debt entirely paid off. But he continued to sell the pineapples from these subsequently acquired leaseholds just the same, and continued to do so up to the first of April, 1918.

And it is fair to presume that if the rival Libby Company had not approached Saito and tempted him with a higher offer, he would have gone on to the end of his contract and turned those pineapples over to the Pineapple Company.

(Here followed respondent's oral argument.)

Mr. Hohfeld. Before adverting again to the matter of the construction of the contract, I shall briefly consider the points made by counsel for the respondents as to the matter of equitable jurisdiction and the question as to the finality of the decree.

As to the point of the finality of the decree, as counsel stated, this matter was before this court at the time that application for the injunction was made. The court in its opinion (260 Fed. p. 154) said:

> "We think that by the decision of the Supreme Court of the Territory, which vacated the decree of the lower court, and which ordered a dissolution of the injunction which had been issued by the lower court, and which also ordered the bill dismissed, the essential rights of the parties were determined, and that the actual point of controversy was decided so far as the courts of the Territory had jurisdiction to decide them. The order of the Supreme Court, remanding the case for proceedings consistent with the opinion, left to the lower court nothing to do by way of adjudicating the essential rights of the parties."

Respondents in their brief (p. 62) cite the case of Rumsey v. N. Y. Life Ins. Co., et al., No. 3444, decided by this court September 7, 1920, in which the appeal was dismissed because the decree was

not final. An examination of the opinion in the Rumsey case, however, will disclose that the cause was merely remanded to the trial court "for such further action compatible with the decision as may be necessary". In the case at bar, however, the lower court was instructed to "dismiss the complainant's bill of complaint filed therein". The additional part of the order instructing the court to take such other or further proceedings prior or subsequent to the dismissal as may be consistent with the opinion, is mere surplusage. It would be the duty of the trial court to do so, regardless of this part of the Supreme Court's decree.

The record, however, shows that there is nothing for the Circuit Court of Hawaii to do but to dismiss the bill.

Counsel for respondents have undertaken gratuitously to make some ex parte remarks about other proceedings respecting the asessment of damages for the injunction. I am not familiar with the procedure in Hawaii in that behalf, but I would be surprised if that were a matter for the Circuit Court to adjudicate in this action. The procedure that we are familiar with here, and which obtains generally, is for a separate suit to be brought on an injunction bond for the settlement of such damages. Counsel has gone outside of the record to suggest something which I do not think the court should take any notice of.

Mr. Ulrich. I beg your pardon. It does appear in the record.

Mr. Hohfeld. If this decree is affirmed, the respondents have their action for damages against the Hawaiian Pineapple Company on the bond put up by the Hawaiian Pineapple Company when the injunction was issued. But that is a separate action. But even assuming that counsel's contention were correct, such action would only be supplemental to and in aid of the decree of dismissal.

Thus in Montgomery Light & Power Co. v. Montgomery Co., 219 Fed. 963, the court said:

> "While there are expressions to be found to the effect that the whole litigation must be disposed of in order for the decree to be a final one, yet an examination of each case cited for respondents will reveal the fact that this means nothing more than that all of the equities and the rights of the parties as presented by the pleadings in the cause must be determined and whenever a decree does determine the equities of a bill and the issues presented by it, the decree if a final one, notwithstanding the cause may be retained for an accounting between the parties and an accounting ordered in aid of the execution of the decree."

It follows, therefore, that even assuming, for the sake of argument, that counsel were right (which I do not concede) that the court would assess damages in connection with the dismissal of the bill, this would be only in the nature of an accounting subsequent to the dismissal of the case.

Coming now to the point of equitable jurisdiction, I will not say much on that, because counsel for respondents makes but a single point against the

equitable jurisdiction of the court. He concedes the fact that no other pineapples could be secured. If the Pineapple Company had commenced an action at law against Saito, all that the company could have recovered as damages would have been the difference between the price it would have had to pay for other pineapples and the contract price. Counsel has said that the pineapples which we had contracted to buy from Saito we had resold to other parties and that our damages were ascertained. Counsel did not mean, of course, to mislead, but his statement is quite inaccurate. The Pineapple Company did not contract for the resale of these pineapples. It had contracted for a sale to various third parties of the *canned* pineapples. Indeed, at the time that the suit was commenced it was the year 1918, and it was the canned pack deliverable during the season of 1918 that was interrupted in part by the refusal of Saito to deliver the pineapples in question. The Pineapple Company contracted to buy the raw product and contracted to sell the manufactured product. As to the loss on the sale of the canned products, *non constat* that those damages would be recoverable in an action at law against Saito, unless the case could be brought within the principle of the case of Hadley v. Baxendale, 9 Ex. 341. The Supreme Court held that there was no evidence which showed that the principle in the case of Hadley v. Baxendale was applicable (Transcript, p. 181). So the natural, proximate damages would only be the difference between

what the company could buy other pineapples for and the contract price.

The strongest case which counsel could cite—I presume it is the strongest because he makes a selection from a list of cases cited in 36 Cyc. 556. There are quite a number of cases cited in the note in Cyc., but counsel cites only one of them in his brief, and it is fair to presume that it was the strongest case. The case cited by counsel is that of Marthinson v. King, 150 Fed. 48 (Respondents' Reply Brief, p. 58).

A brief statement of the facts in this case will show that its principle is not at all applicable to the case at bar. The defendant King owned some growing timber and some camp outfits. Plaintiff Marthinson was a broker. Plaintiff went to King and said he had a chance to sell the standing timber and camp outfits to somebody. King asked $6000 for the property, and the plaintiff made an agreement with him to buy the property for $6000. On the very same day, the plaintiff, Marthinson, made a contract for the resale of the timber to a lumber company for approximately $12,000. When King heard about the contract he immediately entered into a conspiracy with the lumber company and sold the growing timber and the personal property directly to the lumber company, and thus defrauded Marthinson out of his profit of $6000. In an action by the plaintiff asking that the timber be turned over to him, the court said there was no need of that. The plaintiff had a clear claim for definite

damages measured by the loss of his profits, to wit, $6000. That is all that case stands for. To make the case applicable here, you would have to say that the Pineapple Company had a contract with Saito for pineapples, and that the Pineapple Company was going to sell these raw pineapples the same pineapples—to somebody else, and that Saito conspired with the purchaser and sold directly to the third party, and cheated the Pineapple Company out of its profits in the resale of the raw pineapples. Or, again, to make the Marthinson case similar to the case at bar, one would have to say that Marthinson bought the standing timber from King over a period of years, with the intention of manufacturing it into lumber and reselling it, if possible, at a profit, over a period of years; that some two or three years afterwards Marthinson had a contract to sell some lumber, and that King then refused to turn over the growing timber; that Marthinson could not buy growing timber elsewhere, and was unable to complete his contracts for the sale of lumber, to his loss. It certainly would not follow that Marthinson could have recovered from King the loss of his profits on the contract for the sale of the manufactured timber.

Let us now return to the matter of the interpretation of the contract, which I think is the chief, if not the only, point in the case.

In the first place I wish to call the attention of the court to the statement on pages 8 and 9 of respondents' reply brief, as follows:

> "The appellant in its brief adopted the rather curious procedure of constructing an imaginary argument for the appellees, one which is not contended for by them at all, and then of proceeding to demolish that imaginary argument. Appellant says that it is our contention that the phrase, 'that he may own or control on the Island of Oahu", found in the paragraph outlining the obligation of the Pineapple Company refers to and modifies "present holdings" and not "pineapples", and that, therefore, the Pineapple Company agrees to buy only pineapples which may be grown by the planter and not pineapples which may be owned or controlled by him. * * * This is not our contention. Our contention throughout has been that the Pineapple Company contracted to purchase all pineapples which might be grown by the planter on his holdings at Leilehua or all pineapples which might merely be owned or controlled by the planter on present holdings or at the present time," etc.

The Supreme Court in its decision (Transcript, pp. 186 to 187) said:

> "In the first paragraph of the contract quoted above, the company agreed, during the term of four years, to buy all the merchantable smooth Cayenne *pineapples that might be grown by the planter on his 'present holdings'* at Leilehua or elsewhere on the Island of Oahu, or that he might own or control on the Island of Oahu."

If there still be any doubt as to what the Supreme Court meant by this language, or what respondents contended for before the Supreme Court, a couple of extracts from their briefs filed in the Supreme Court will remove all possible doubt. Thus respond-

ents in their opening brief, which they filed as appellants before the Supreme Court, said:

> "The first quoted paragraph from the contract contains the agreements on the part of the Pineapple Company; that is, what it agrees to purchase, and which we submit means his *present holdings* at Leilehua, his *present holdings* elsewhere on the Island of Oahu, or his *present holdings* that he may own or control on the Island of Oahu."

In the reply brief of the Pineapple Company filed in the Supreme Court, it is said:

> "Appellants (Saito and the Libby Company) raise the contention in their brief that all these clauses refer back to present holdings; namely, *present holdings* at Leilehua, *present holdings* elsewhere on the Island of Oahu, *present holdings* that he may own or control on the Island of Oahu."

And in their closing brief, Saito and the Libby Company said:

> "We believe that, considering the whole transaction as brought out in the testimony at the trial, there is only *one reasonable construction* which can be placed upon this language, and that construction is that the Pineapple Company was obligating itself to purchase all the pineapples which Mr. Saito might grow *during the term stated* upon any *holdings* which he then *owned* or *controlled* upon the Island of Oahu."

We contended for the same construction of this contract before the Supreme Court as is contended for before this court, to the effect that the words, "that he may own or control on the Island of Oahu",

refer to "pineapples" and not to "present holdings". Saito and the Libby Company in their brief before this court now concede that the position of the Pineapple Company before the Supreme Court and before this court is correct, and they entirely repudiate, in their brief before this court, the construction of the contract contended for in the Supreme Court, which they there refer to as the "only one reasonable construction". Respondents in this court now seek to "mend their hold", and they disclaim all paternity for their intellectual child before the Supreme Court.

The change of position of respondents whereby they now admit that the words, "that he may own or control on the Island of Oahu", refer back to "pineapples", is quite a material concession, from one point of view, in that it brings these words in the obligation of the Pineapple Company into perfect balance and unity with the same words in the obligation of the planter, where we have seen that this clause necessarily refers back to the word "pineapples" as its only possible antecedent. The only words which respondents now seek to wrench from their natural meaning, and from their balance and unity with the obligation of the planter, are "elsewhere on the Island of Oahu". They still maintain that these words modify "present holdings", which appear before the word "Leilehua" in the obligation of the Pineapple Company. Yet we have also seen that if we transpose these words so that the sentence would read, "that may be grown by the planter at

Leilehua, (on his present holdings), or elsewhere on the Island of Oahu", such a construction would be impossible, and the words "elsewhere on the Island of Oahu" would necessarily modify the words "may grow". What, therefore, is the answer and the only answer which respondents attempt to make to the construction contended for by appellants? In their brief (p. 12) they say:

> "The term 'Leilehua', for example, designates a general locality on the Island of Oahu, the exact boundaries of which are at best very indefinite. Just where Leilehua ends and another named locality begins no one can say within any degree of certainty. * * * Consequently in designating localities, for the purpose of safeguarding the parties in the event that any dispute might arise as to whether or not the place designated has been accurately described, a phrase is very commonly inserted in indentures and contracts of this character, substantially in the language found in this particular contract, namely, 'or elsewhere on the Island of Oahu'."

But the evidence shows that the leasehold interests of Saito which he owned at the time were designated by metes and bounds, and were definitely and exactly known at the time. So well known were they that an informal memorandum stating the amount of acreage involved was endorsed at the foot of the contract. Even assuming that respondents' idea was correct; that "elsewhere on the Island of Oahu" was put in for good measure, to include present holdings in or near the district of Leilehua, the words used should have been "in the neighbor-

hood of Leilehua''. Certainly if the exact boundaries of the district of Leilehua were uncertain, they could have covered the point by adding the words "or in the vicinity or neighborhood of Leilehua''. The contract, however, uses the words "elsewhere on the Island of Oahu'', which shows, of course, that the mere neighborhood or vicinity of Leilehua was not contemplated, but that the whole Island of Oahu was included as the area from which pineapples grown by Saito should be furnished.

Another objection to this interpretation is the fact that in the obligation of the planter, in the next paragraph, we have seen that the words "elsewhere on the Island of Oahu'' modify the words "may grow'', as an adverbial phrase of place, whereas respondents contend that the words "elsewhere on the Island of Oahu'' refer to "present holdings'' in an adjective sense. But is it not more natural to construe the words "elsewhere on the Island of Oahu'', which occur in the obligation of the Pineapple Company, in the same sense that they are used in the unambiguous obligation of the planter?

Counsel for respondents also suggests that in the obligation of the planter the last words, "during the term stated'', should be lifted out of their location there and should be put in the obligation so that they will modify the word "deliver'', and be read, "that the planter will deliver during the term stated'', the pineapples in question. Even if these

words could be so interpreted (which we do not admit), nevertheless, futurity must necessarily be imported into the words "may grow" and "may own or control" in the obligation of the planter equally whether the words, "during the term stated", are used at the end of this obligation or not. Furthermore, we have noticed that in the extract from their closing brief (ante p. 29) before the Supreme Court they made the contention that the words, "during the term stated", did modify the word "grow" and the words "own or control". They have taken a new and different position for the first time, in their brief before this court.

Now what is the next point which respondents make? They say that a clause of this contract provides that we should deliver lug boxes at the railroad station at Leilehua and that Saito must deliver his fruit to Leilehua. The Supreme Court said (Tr. pp. 187-188):

> "Assume that subsequently to the date of the contract Saito acquired land at Waimanalo or at some other locality remote from and inaccessible to Leilehua, and that upon this land he grew and produced pineapples. In that event, if the construction urged by complainant is to be adopted, Saito would be required to deliver these pineapples to the company f. o. b. cars at Leilehua at $14.00 per ton, when from the geographical and physical conditions prevailing and which are within the common knowledge of all, the expense of transportation alone would far exceed that amount."

But I think this argument of the Supreme Court proves a little too much. In the first place, the same objection would hold even if the contract should be construed as respondents contend, to wit, "present holdings at Leilehua or present holdings elsewhere on the Island of Oahu". The words "elsewhere on the Island of Oahu" would, of course, include Waimanalo, and unless we are to accept the interpretation of these words as meaning in the neighborhood or vicinity of Leilehua, as suggested by respondents, the same objection would exist in the one case as in the other, whether, in other words, the contract be interpreted to apply only to holdings which Saito had at the time at Leilehua, or anywhere else on the Island of Oahu, or whether it included holdings which he might subsequently acquire. This point apparently escaped the attention of the Supreme Court.

Again, these Japanese growers are men of more or less limited means. As shown by the evidence here, when Saito wanted to increase his holdings he had to borrow $6000 from the Pineapple Company. He lived at Leilehua. The only holdings which he had at the time were at Leilehua, and so the parties naturally inserted as the delivery point on the railroad, the district of Leilehua through which the railroad ran. It would be fair to presume that if any other holdings were acquired by Saito, they would probably be somewhere in the same neighborhood. But suppose they were not. The Pineapple Company could not compel Saito to grow pineapples

a hundred miles or a thousand miles away from Leilehua. If he did so that would be entirely up to him. If he wanted to grow pineapples at Waimanalo, before he should do so he should go to the Pineapple Company and tell them that he intended to grow pineapples over there provided the Pineapple Company would accept delivery of the pineapples at such and such a place, which under the circumstances would be a reasonable point for the delivery of the pineapples to the Pineapple Company. And the Pineapple Company would, of course, consent to any reasonable arrangements in that behalf.

Another argument respondents make as to this same point is this: The Pineapple Company has practically bought this man Saito. They own him hand and foot. He cannot stir. Every pineapple he raises he must turn over to the Pineapple Company. They say that the Pineapple Company did not buy pineapples, but that they bought Saito hand and foot. Well, I do not know of anything against public policy for a company to buy all the raw materials it may need in its plant, from a certain man, for a certain period of time, or for a gatherer or producer of raw material to say that for a certain time he will agree to gather up all the raw material in a certain district and sell it to a manufacturing company. Such contracts are made every day. I see nothing illegal about that, or unbusiness-like, for that matter. But even if there were some point to counsel's objection, the objection comes with par-

ticular ill grace from the mouth of counsel for the Libby Company. In this connection permit me to call the court's attention to the contract of April 1, 1918, between the Libby Company and Saito, which constitutes Exhibit "F" to our complaint (Transcript, p. 81). Counsel say, in their reply brief (p. 25) that:

> "The most casual examination of the contract of April 1, 1918, between Saito and the Libby Company will at once show that Libby was contracting only with respect to pineapples to be grown on lands definitely designated and the extent of which was perfectly ascertained. * * * Libby, McNeill & Libby has never for a moment contended that their contract of April 1, 1918, covers any pineapple lands which may be acquired after the execution of the contract."

In answer to this statement of counsel, and in entire refutation thereof, I will direct the court's attention to page 86 of the Transcript. It will there be seen that in express words, future acquired lands were included within the terms of the Libby Company's contract. In the obligation of Saito the following language is used: That he will sell to the Libby Company pineapples grown on "any and all other lots, pieces or parcels of land hereafter and between the said first day of April, 1918, and the said 31st day of March, 1925, acquired, owned or controlled by the planter in said City and County of Honolulu".

And in the obligation of the Libby Company which directly follows, it is provided that the Libby

Company will purchase from the planter, that it will buy, all pineapples "that may be grown by the said planter on the planter's said holdings, *or elsewhere in the City and County of Honolulu*, Territory of Hawaii, or that the planter may own or control in the City and County of Honolulu", etc.

It will thus be seen that Saito was bound for the period of five years to the Libby Company to sell them all the pineapples that he might grow, own or control during said period in the City and County of Honolulu, whether on lands owned by him at the time of the making of the contract, or acquired thereafter during the term of said contract. I am advised that the Island of Oahu is a part of the City and County of Honolulu, so the physical boundaries of the Libby contract are at least as great as, if not greater than, the boundaries named in the contract of the Pineapple Company.

And where, let us ask, was delivery for these pineapples provided by the Libby contract? The same provision in that regard is contained in the Libby contract (see Transcript, p. 87) as in the contract of the Pineapple Company, it being provided that the planter shall deliver the fruit f. o. b. cars at Leilehua, Oahu. It does indeed seem strange that counsel should raise this point in objection to the contract of the Pineapple Company, when the same identical provision is contained in the contract of the Libby Company, and it seems ill advised, to say the least, that counsel should mention this point as

militating against the construction of the contract as contended for by appellant. I am sure that counsel for the Libby Company would be the last one to tell Saito that he was not under obligation to sell all pineapples from subsequently acquired lands, to the Libby Company, if Saito should endeavor to sell any of them to the Pineapple Company.

Counsel for the Libby Company has endeavored to give some explanation for Saito's subsequent conduct in delivering pineapples from subsequently acquired lands to the Pineapple Company for nearly two years after his contract. They say he was an ignorant Japanese. Maybe he was. The record does not so show. For all we know by the record, he may have been a very educated man. Let us assume, however, that he was a very ignorant man. There is such a thing as actions speaking louder than words. Although he might not be able to read the contract, he, nevertheless, understood its meaning, or he would not have made delivery of these pineapples from subsequently acquired lands, when he might have received more for them from another canning company. But Saito sold us those pineapples not only while the debt owed to our company was unpaid, but after the same had been discharged on August 10, 1917 (he continued for six or eight months thereafter to sell us these pineapples. Counsel says that there is nothing in the record to show that Saito could have sold these pineapples to anybody else and that it does not appear even that the Libby Company was in business at

that time. In answer to this argument of counsel, however, permit me to call the court's attention to a paragraph in the answer filed by the Libby Company (Transcript, p. 102):

> "Respondent (the Libby Company) alleges that it did, in January, 1917, and for a long time prior thereto have a contract with one Shiroma, a lessee of Chang Chau, for all pineapples grown by him upon lot 1 described in said lease of August 10, 1916, and that complainant well knew of said contract; that complainant, although learning of said contract between said respondent and Shiroma, permitted respondent Saito to deliver to it pineapples from said lot 1," etc.

This allegation in the Libby Company's answer shows not only that it was in business in January, 1917, but had been for several years prior thereto, and that up to the time that Saito bought out Chang Chau the pineapples from this very land were being bought by the Libby Company, and the Libby Company in its said answer complains of the conduct of the Pineapple Company in permitting Saito to deliver these pineapples to the Pineapple Company instead of permitting Saito to go on delivering them to the Libby Company as had his predecessor, Shiroma.

This quotation from the Libby Company's answer shows how much weight there is to the argument of counsel for respondents when he tries to explain away the conduct of Saito in selling pineapples to us from subsequently acquired lands for

nearly two years after the making of the contract. It shows that Saito, when he secured these pineapples from the Chang Chau lot, thought that he could not go on as Shiroma had previously done, delivering these pineapples to the Libby Company, but must, under his contract, deliver them to the Pineapple Company. And Saito went along, honestly and in good faith, observing his contract as he and the Pineapple Company understood it, until the rival Libby Company tempted Saito with a higher price for his pineapples, and Saito, in violation of his contract, proceeded thereafter to make delivery of these pineapples to the Libby Company.

For all these reasons we submit that the decree of the Supreme Court should be reversed and the decree of the Circuit Court should be affirmed.

No. 3374

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HAWAIIAN PINEAPPLE COMPANY, LIMITED (a corporation),
Appellant,

vs.

MASAMARI SAITO and LIBBY, MCNEILL & LIBBY OF HONOLULU, LIMITED (a corporation),
Appellees.

MEMORANDUM OF APPELLEES IN REPLY TO PRINTED ORAL ARGUMENT OF APPELLANT.

THOMPSON, CATHCART & LEWIS,
BARRY S. ULRICH,
Attorneys for Appellees.

FILED
NOV 2? 1920
F. D. MONCKTON,
CLERK

No. 3374

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Hawaiian Pineapple Company, Limited (a corporation),

Appellant,

vs.

Masamari Saito and Libby, McNeill & Libby of Honolulu, Limited (a corporation),

Appellees.

MEMORANDUM OF APPELLEES IN REPLY TO PRINTED ORAL ARGUMENT OF APPELLANT.

In filing a printed copy of its oral argument, the appellant has taken a step which could not have been anticipated, and for which no provision is made by the rules of practice of this court. In view of the fact that the appellees have not had the similar advantage of placing of record a copy of the oral argument made on their behalf and particularly in view of the fact that certain matters were urged for the first time by appellant, in the closing part of its argument, which the appellees had no opportunity to answer, this means is taken to briefly place before the court the substance

of portions of the argument presented on behalf of the appellees together with a few suggestions briefly answering those matters which appellees have not yet had an opportunity to meet. It would not be possible at this time, and no attempt will be made to follow the oral argument as it was presented.

Three main questions were presented for the consideration of the court, (1) the question of the construction of the contract of May 18, 1916, between the Hawaiian Pineapple Company and Masamari Saito, (2) the question of the equitable jurisdiction of the trial court, and (3) the question of the appellate jurisdiction of this court. These questions will be considered in the order named.

I.

THE CONTRACT OF MAY 18, 1916, CLEARLY APPLIES ONLY TO PINEAPPLES GROWN OR OWNED OR CONTROLLED BY THE PLANTER ON PRESENT HOLDINGS OR AT THE PRESENT TIME.

The construction of the contract leads to a consideration, first, of the question as to what the language of the contract itself shows, and, second, as to what extrinsic facts and circumstances surrounding the execution of the contract and subsequent to its execution show.

In considering the meaning of the language of the contract itself, appellees have called the court's attention to the fact that the contract was executed upon a printed form drawn for use generally among plant-

ers with language calculated to meet various sets of contingencies which might arise in various cases. In its brief and in its argument, the appellant has absolutely refused to consider this fact. Ignoring the fact that the language must be considered as having been used for application in other possible cases as well as in this case, the argument of the appellant has been to take out of the contract one paragraph (not the paragraph attempting to fully set forth the obligation of the parties, but a subsequent brief and abbreviated paragraph), to attempt to attribute to the language of that paragraph a meaning favorable to its contention, and then, holding that incomplete and abbreviated paragraph aloft, to endeavor to make all of the rest of the contract conform to the meaning which they have attributed to that paragraph.

We, on the other hand, have taken the contract for what it actually is. We have read the contract as it actually reads, and we have pointed out to the court that, read in the light of surrounding circumstances, it clearly has no application whatever to pineapples which might subsequently come within the control of the planter and which were not at all within the contemplation of the parties at the time of the execution of the contract.

We have pointed to the following paragraphs of the contract which follow each other in the instrument in the order in which we here set them forth:

> "The Pineapple Company agrees that during the term of four years beginning May 1, 1916, and ending April 30, 1920, it will handle and buy

under the conditions as hereinafter detailed, and with such exceptions as are hereinafter stated, all the merchantable smooth Cayenne Pineapples that may be grown by the Planter on his present holdings at Leilehua, or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu."

"The Planter agrees that he will deliver to the Pineapple Company, under the terms and conditions, and with the exceptions hereinafter contained, all the merchantable smooth Cayenne Pineapples that he may grow at Leilehua, or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu, during the term stated."

* * * * * * *

"It is mutually agreed that the Pineapple Company will furnish f. o. b. Railroad Cars at Leilehua, Oahu, lug boxes for the delivery of the fruit, and that the Planter will deliver said fruit f. o. b. Railroad Cars at Leilehua, Oahu, in said lug boxes, and that the said merchantable pineapples will be delivered in such condition of ripeness as may from time to time be required or designated by the said Pineapple Company."

We have pointed out that the agent of the Hawaiian Pineapple Company went to Leilehua, that he found there a certain 150 acres of pineapples belonging to Saito, that he bought these pineapples and that in buying them he used the printed form above set forth, filling in, in the blanks left in the printed form, the word "Leilehua" in each place where that word appears above. We feel that there can be no question but that, by the language used in the first paragraph outlining the obligation of the Pineapple Company, the company agreed to buy only the pineapples to be

grown by the planter on the holdings which he then had at Leilehua, or pineapples which he then owned or controlled. If the contract had been particularly drawn for the purpose of purchasing Saito's pineapples instead of being a printed form for use generally among planters, it is doubtful if provision would have been made for the purchase of the pineapples in the event that they might be elsewhere than at Leilehua, although this might have been done even in that event to avoid the possibility frequently arising that "Leilehua" would not accurately describe the place where they were located.

Obviously in purchasing pineapples that "may be grown by the planter on his present holdings at Leilehua or elsewhere on the Island of Oahu", nothing but "present holdings" are covered. The words, "or that he may own or control on the Island of Oahu" are clearly inserted to cover the possibility that Saito, or whatever other planter the printed form might be used in contracting with, did not actually grow the pineapples in question, but merely owned them or controlled their disposition. They meet the contingency that others might actually be growing pineapples and the principal planter himself merely sharing in the profits to be derived from their sale in such manner as he might designate. We say that in buying pineapples which he may own or control, the Pineapple Company did not buy pineapples which he "may own or control or *hereafter* acquire". We say that the language itself as it stands indicates pineapples within the contemplation of the parties at

the time of the execution of the contract, the quantity of which they could estimate, and does not apply to pineapples in quantities wholly impossible of determination, which might be *subsequently* acquired by the planter.

The Pineapple Company agrees in the paragraph referred to, to buy two things:

First. Pineapples that may be grown by the planter; and

Second. Pineapples that may be owned or controlled by the planter.

It agrees to buy:

1. "Pineapples that may be grown by the planter —(where?)—on his present holdings at Leilehua, or elsewhere on the Island of Oahu."
2. "Pineapples—that he may own or control—(where?)—(on his present holdings at Leilehua, or elsewhere) on the Island of Oahu."

The foregoing indicates the substance of the undertaking had it been written out in full. It has been our contention that the only reasonable reading of the paragraph referred to obligates the Pineapple Company to purchase pineapples owned or controlled in the same place as pineapples to be grown by the planter, and that no intent was indicated to cover pineapples which may be owned or controlled elsewhere in the future while only applying to pineapples which may be grown at a definite place at present. We feel that there can be no serious question but that the above

indicates the real intent as expressed by the parties. The paragraph referred to covers pineapples which may be grown on present holdings or pineapples which are at the present time owned or controlled by the planter.

Absolutely the only answer which appellant has even attempted to this line of argument is to say,

> "doubtless the language of this paragraph taken alone does apply only to pineapples grown, owned or controlled by the planter at the time the contract was executed, but we cannot take the language to mean what it appears to mean for the reason that the meaning does not accord with the meaning which we have arbitrarily placed upon the short and abbreviated paragraph which follows and outlines the obligation of the planter."

Faced with an entire inability to successfully attack the conclusion reached by the Supreme Court of the Territory of Hawaii, the appellant has devoted great endeavor to an attempt to show that that court reached the right conclusion by an incorrect rather than by the correct line of reasoning. The obvious answer to such an argument, of course, is that it makes no difference whatever how the conclusion was reached, if it is in fact correct. Counsel in his oral argument, going entirely outside the record, read to the court portions of briefs claimed to have been filed with the Supreme Court of Hawaii, which he claimed indicated that the line of argument adopted before that court was that the phrase "that he may own or control on the Island of Oahu" modified "present holdings" rather than "pineapples". We say again, as we have said in our

brief, that, properly analyzed, this was not the real contention presented to that court, although the substantial effect of the argument presented in that form or in the form which was really urged would be the same. We feel that it would be an imposition upon this court to go into an analysis of the briefs and argument presented before the Supreme Court of Hawaii, for the purpose of demonstrating the character of the reasoning there, because, in the first place, none of that matter is before this court, and, in the second place, it is utterly immaterial what line of reasoning was urged before that court. The appellant has been definitely advised as to the character of the argument presented before this court, and it is our contention that counsel has entirely failed to meet that argument. The Supreme Court of Hawaii has decided that the Pineapple Company, by the contract in question, bought only pineapples to be grown upon the present holdings of the planter located at Leilehua, whether they were grown by the planter himself or merely owned or controlled by him. It is submitted that the judgment of the Supreme Court of Hawaii to that effect should be affirmed.

Referring in the second place to the more abbreviated paragraph of the contract, which follows the paragraph just considered, it is our contention that it does nothing more than impose upon the planter a corresponding obligation to sell and deliver what the Pineapple Company in the previous paragraph had agreed to buy. As indicating that the second paragraph is merely an abbreviated form of the first, in

the sense indicated, we again set forth the two paragraphs with the corresponding phrases set opposite each other.

Obligation of Pineapple Company.	Obligation of Planter.
1. The Pineapple Company agrees that * * * it will handle and buy under the conditions as hereinafter detailed, and with such exceptions as are hereinafter stated,	1. The Planter agrees that he will deliver to the Pineapple Company under the terms and conditions and with the exceptions hereinafter contained,
2. during the term of four years beginning May 1, 1916, and ending April 30, 1920,	2. during the term stated
3. all the merchantable, smooth, Cayenne Pineapples that may be grown by the Planter on his present holdings at Leilehua, or elsewhere on the Island of Oahu,	3. all the merchantable, smooth, Cayenne Pineapples that he may grow at Leilehua, or elsewhere on the Island of Oahu,
4. or that he may own or control on the Island of Oahu.	4. or that he may own or control on the Island of Oahu.

The provision for delivery f. o. b. cars at Leilehua indicates clearly an intent to contract with respect to the then holdings of the planter, all of which were known to be at Leilehua.

We have contended that the paragraph in the contract providing for delivery of the pineapples f. o. b. railroad cars at Leilehua is a further indication that the parties had in mind only pineapples to be harvested from the lands then held by the planter and known to be located at Leilehua and susceptible of being delivered at the place indicated. The provision in question shows that the parties did not have in mind fruit which might subsequently come under the control of

the planter at any place on the Island of Oahu, as it is obvious that compliance with the provisions of the contract would then, under contingencies which might arise, become economically impossible. This provision shows that the minds of the parties were directed at a certain definite pineapple crop located at a certain definite place, which place was Leilehua on the Island of Oahu.

The appellant has attempted to answer this suggestion by saying that it was the intent of the parties to confine the operations of the planter to the immediate vicinity of Leilehua, and that they purposely closed upon Saito the door which might lead to profitable pineapple growing elsewhere. Such a construction would make the contract unreasonable, unfair, improbable and such as a prudent man would not be apt to enter into. It would impose a penalty against legitimate business endeavor. We have pointed out that every rule of law opposes the adoption of such a conclusion where any other conclusion is possible. On the other hand the conclusion of the appellees, that the provision of delivery f. o. b. cars at Leilehua is merely another indication of the intent of the parties to confine the contract to pineapples economically susceptible of delivery at the railroad station there, is in entire accord with a perfectly reasonable, probable and natural construction of the contract.

In this connection, the appellant has confused the issues before the court by referring at length to an entirely different contract which was subsequently made by Libby, McNeill & Libby with Saito, and the

construction of which is in no sense before this court. They say that that contract contemplated pineapples to be after-acquired elsewhere, and yet that it provided for delivery at Leilehua. We do not propose at this time to go into a consideration of the provisions and proper construction of that other contract. Even assuming that such a conflict in the provisions of the contract, as is suggested, exists, this court is not now asked to determine whether the provision for delivery at Leilehua or the provisions alleged to refer to pineapples which might be acquired elsewhere, should prevail. It has been our contention that in fact no attempt has ever been made to apply that other contract to after-acquired pineapples. The appellant has vigorously met this contention with an argument to the effect that under the provisions of that contract such an attempt might well be made. We have not considered the question as to whether it might or might not. The Libby contract is valuable in this case only as showing how perfectly obvious it is that if after-acquired pineapples are intended to be covered by a contract, language of a perfectly definite meaning, and such language as is entirely lacking in the contract before this court, would have to be used. Whether it was the intent of the parties to make the Libby contract cover after-acquired pineapples or not, and whether, if such was the intent, its expression has been so far nullified by the provision for delivery at Leilehua as to be ineffective, might be interesting questions should they ever be presented to a court for determination. They are not now presented to this court and

they have nothing whatever to do with the questions presented by this appeal. There can be no possible question that where a contract provides for delivery at a specific place, such a provision is a very clear indication that the parties had in mind that the commodities covered by the contract were such as would be economically susceptible of delivery at that place. When with such a provision is coupled the fact that a definite pineapple crop to be grown on a definite acreage is noted as such upon the face of the contract, the fact that every reason existed for knowing in advance the quantity of the commodity purchased and other facts showing beyond question that the parties had in mind nothing but pineapples to be grown on a certain 150 acres of land located near the place provided for as the place for delivery, we contend that the conclusion becomes unavoidable that the parties were contracting only with respect to those particular pineapples.

The endorsement placed on the last page of the contract by the clerk of the Hawaiian Pineapple Company prior to its execution by the company: ''Approximately 150 acres; approximately 1500 tons (Class B 200 tons)'', is a part of the contract itself and is decisive of the dispute.

No answer attempted by appellant.

The appellees have contended that by making upon the face of the contract an endorsement in writing, ''Approximately 150 acres; approximately 1500 tons (Class B 200 tons)'', prior to the execution of the contract, the Hawaiian Pineapple Company made that provision a part of the contract itself. Cases have been

cited showing that an endorsement of this character made upon the face of a contract prior to, or at the time of its execution, becomes a part of the contract itself. If this is true, then it necessarily follows that the contract in question in fact applied only to the pineapples to be grown upon the 150 acres then known to have been held by Saito at the time of the execution of the contract, and it consequently follows that the judgment of the Supreme Court of the Territory of Hawaii must be affirmed. Neither in its brief nor in its oral argument has the appellant attempted to meet this contention. We believe that it cannot be successfully met. We do not see how the Hawaiian Pineapple Company, under the circumstances, could possibly have made it more perfectly clear to Saito, or to anyone considering the terms of the contract, that it was contracting only with respect to the 150 acres in question, than by thus definitely noting that fact upon the face of the contract itself. If any answer could have been made to the suggestion, we believe it is fair to say that the appellant would at least have attempted to make it. This act of the Hawaiian Pineapple Company itself, clearly limiting the scope of the contract, furnishes, we submit, a most convincing argument for an affirmance of the judgment:

The circumstances under which the contract was made show clearly that the parties intended to contract with respect to a then definitely ascertained quantity of pineapples.

The appellees have pointed out that at the time of the execution of the contract, the following were existing facts and circumstances:

The cannery capacity of the Hawaiian Pineapple Company was definitely limited;

The Company had to estimate as far as two years in advance the quantity of pineapples to be purchased from independent growers, so that its cannery capacity would be exactly met by the combined crops from the lands of independent growers contracting with it and from its own lands.

The pineapple business was just emerging from a period of over-production, having extended over a period of two years or more, and the Hawaiian Pineapple Company was carrying a heavy stock of pineapples from previous years which it had been unable to sell.

The Company's agent had gone to Leilehua, had found Saito's holdings to comprise approximately 150 acres, from which he estimated that the crop would be approximately 1500 tons, of which 200 tons would be Class B fruit. He had agreed with Saito to buy that fruit and Saito agreed to sell it.

Saito had no other fruit to sell and no other fruit was within the contemplation of the contracting parties.

We have contended that to place upon the contract the construction, that the Hawaiian Pineapple Company, under the circumstances indicated, actually thereby purchased from Saito any and all pineapples which he might in any way get under his control during the period of four years, anywhere on the Island of Oahu, and bound itself to pay him $14 a ton for those pineapples, would have been to make the contract unrea-

sonable and improbable in the extreme, and such a contract as no prudent business man could be expected to enter into. We have pointed out, in the first place, that there is every reason to suppose that the Pineapple Company had no intention of purchasing pineapples in excess of what its cannery could handle. We have pointed out, in the second place, that if pineapples went down in price, owing to just such a period of over-production as had already been experienced, and if the construction contended by the appellant were correct, Saito would be in a position to bring upon the Pineapple Company what might well be almost financial ruin. With a large over-production of pineapples and with pineapples selling as low as $5 a ton, as the facts show the case had been in the year preceding the execution of the contract (Transcript page 227), Saito would have been able to purchase $5 a ton pineapples all over the Island and to unload them upon the Hawaiian Pineapple Company at $14 a ton. No one knows better than the officials of the Hawaiian Pineapple Company themselves that they had no intent in the world of entering into a contract which would have made that possible. They were not buying the Island of Oahu, so far as pineapples were concerned, at $14 a ton for four years. They were only buying the crops from a certain 150 acres at $14 a ton for four years, and that is exactly the intent which they have clearly expressed in the contract in question.

With this situation before the court, we have pointed to the thoroughly established rule of law that the con-

tract, if possible, must be construed in such a way as to make it rational and probable, and such a contract as reasonably prudent men would enter into. We find nothing in the brief or argument of the appellant which satisfactorily meets these contentions.

The endorsement made on the contract by the Hawaiian Pineapple Company "approximatly 150 acres; approximately 1500 tons (Class B 200 tons)" even though considered not an actual part of the contract is a circumstance attendant upon the execution of the contract clearly indicating the intent of the parties to contract with respect to the 150 acres in question only.

No answer attempted by appellant.

We have contended that even though the endorsement referred to be considered not a part of the contract itself, nevertheless the fact that it was made upon the face of the contract prior to its execution by the Hawaiian Pineapple Company shows clearly, and shows beyond question, an intent to limit the scope of the contract to the 150 acres, known to be held by Saito at that time.

We believe that the effect of this endorsement, considered in connection with the other evidence before the court, is entirely conclusive as indicating the intent of the parties to confine the scope of the contract as indicated. Here again the appellant has not even attempted an answer.

The fact that Saito sold a small quantity of pineapples from a single twenty-acre lot, a part of the after-acquired premises, to the Hawaiian Pineapple Company at the same price as the price stipulated in his previous contract, is of no value as showing any construction placed upon the contract of May 18, 1916.

In considering the actions of the parties which are alleged as showing a practical construction placed upon the contract, we have in the first place called the court's attention to the following thoroughly established rule of law:

> "But the practical construction is not conclusive, and *may be considered only when the contract, considered in the light of surrounding circumstances, leaves the proper construction in doubt." (13 Corpus Juris* 548.)

It is the contention of the appellees that the contract, considered in the light of surrounding circumstances, leaves no possible doubt as to what its proper construction is. It is, therefore, contended that any consideration of an alleged construction placed upon the contract after its execution, is beside the point and of no avail in this case. But, if we do turn to a consideration of the actions of the parties after the execution of the contract, we find nothing which indicates any intent or any understanding that the contract should be considered as applying to after-acquired pineapples. The appellant has laid particular stress upon the fact that, prior to finally concluding negotiations for the disposition of the after-acquired pineapples as a whole, Saito sold a small quantity of pineapples from the second or third ratoon crop harvested from a twenty-

acre piece to the Hawaiian Pineapple Company at the same price as the price stipulated for the crops to be grown on lands covered by his previous contract with that Company. We have contended that this fact shows nothing in the way of any construction placed upon the previous contract for a number of reasons. In the first place, the quantity sold at these prices was so small as to indicate nothing other than that Saito had not yet made arrangements satisfactory to himself for the disposition of his after-acquired pines. In the second place, that there was nothing to show that in fact Saito could have profitably disposed of his pineapples elsewhere prior to the time that he entered into the contract of April 1st with Libby, McNeill & Libby. Counsel in his oral argument has made much of the fact that Libby, McNeill & Libby apparently had, at a previous time, a contract with another Japanese by the name of Shiroma for pineapples to be grown on one of the lots in question. Surely it is obvious that there is nothing in that fact which could be taken as indicating that Saito could have made any kind of a profitable contract with Libby, McNeill & Libby, or with any other person or corporation for the sale of the pineapples to be grown upon the after-acquired lands prior to April 1, 1918, at which time he did sell those pineapples to the Libby Company. Because Libby, McNeill & Libby had at one time bought pineapples grown on one of the lots in question, does not mean that that Company was in the field at Leilehua between the time that Saito acquired the subsequently owned lands and the time that he sold the pineapples to be

grown on those lands, offering satisfactory prices for the pineapples in question. We say again that the record is entirely silent so far as concerns any showing that Saito could have profitably disposed of his after-acquired pineapples prior to April 1, 1918.

We have further indicated that the record shows that Saito was illiterate to the extent that he did not understand the English language and that an interpreter had to be used in dealing with him. It has been pointed out that Saito's ideas as to the real meaning of the printed form, as subsequently completed by signature and endorsement, derived perhaps through imperfect translations and reached at times subsequent to the execution of the contract, are of insignificant evidential value. The real question before the court is what was the intention of the parties, as indicated by the language used and the attendant circumstances, at the time of the execution of the contract, and it is submitted that placing itself as nearly as possible in the position of the parties at the time of the execution of the contract, the Supreme Court of Hawaii reached the proper conclusion in deciding that they intended to buy and sell nothing excepting a definite crop of pineapples then within their contemplation. The only other so-called act of the parties in construing the contract, which has been seriously considered by the appellant in the oral argument, was the fact that the Hawaiian Pineapple Company loaned Saito $6000 upon perfectly good security on a short term loan and thereby enabled him to develop other lands, the crops from which it did not see fit to buy until it was too late.

The act at most shows a willingness on the part of the Pineapple Company to enable Saito to develop other lands, the crops from which it doubtless thought it could buy or not, as subsequently might seem advisable, all of which was done with no possible risk to the Pineapple Company.

Every word of the contract is the language of the Hawaiian Pineapple Company. A contract must be construed most strongly against the person using the language employed, and this is particularly true in the case of a printed form prepared by one of the parties.

No answer attempted by appellant.

The appellees have pointed out that the contract in question was on the printed form of the Hawaiian Pineapple Company with the blanks and endorsement filled in by the Hawaiian Pineapple Company, and that the language used was entirely the language of the Hawaiian Pineapple Company. Cases have been cited laying down what must indeed be admitted to be the law, that in case of doubt a contract must be construed most strongly against the person preparing it, and whose language is used in it. The authorities make this rule particularly applicable in the case of a printed form such as that used in the present case. The Hawaiian Pineapple Company prepared the document and used language, which language we now find it endeavoring to construe in a way contrary to a contention reasonably urged by the other party to the contract. It is submitted that that controversy must be resolved under the law against the Hawaiian Pineapple Company. If the appellant had intended to make its con-

tract apply to after-acquired pineapples, it would have been perfectly easy for it to have so worded it as to preclude the possibility of controversy. On the other hand, it has so worded its contract that the Supreme Court of the Territory of Hawaii has said that the language used clearly applies only to pineapples to be grown upon lands held by the planter at the time of the execution of the contract. The appellees submit that there really can be no reasonable doubt but that the construction adopted by the Supreme Court of Hawaii is correct, and they further add in this connection that, even if there could be a doubt, that doubt must be resolved against the appellant. Neither in its brief, nor in its oral argument, has the appellant attempted to answer this contention.

Where a part of a contract is printed and another part is in writing, as where a printed form is used and blanks filled in or addenda made, as in the present case, the part in writing must prevail.

No answer attempted by appellant.

Appellees have cited authorities in support of the foregoing rule of law. We have contended that in the present case, if anything is made or is left uncertain by the printed part of the contract in question, all uncertainty has been removed by the use of the language in writing definitely specifying the acreage and the pineapples intended to be covered by the contract. The law is to the effect that such written portion of the contract must prevail, if the printed portion is contrary or is indefinite. In this instance

also the appellant, both in its brief and in its oral argument, has seen fit to remain entirely silent.

Without at this time further considering them, we again set forth the following additional rules of law, all well recognized, and all of which as applied to this case contribute to make more sure that the Supreme Court of Hawaii properly construed the contract in question:

Particular language confining or limiting the operation of a contract governs more general language found elsewhere in the contract;

Where doubt exists, that construction of a contract which makes it reasonable and just should be adopted;

Where under a proposed construction of a contract contingencies might arise which would render performance impossible, that construction cannot be adopted as against a construction where there could be no impossibility of performance;

A contract will be construed, if possible, in such a way that the obligations and counter-obligations imposed will be mutual.

II.

THE COURT IN EQUITY WAS WITHOUT JURISDICTION TO PROCEED BECAUSE THE LEGAL REMEDY WAS ADEQUATE.

The appellees have contended that, inasmuch as the contract in question was one for the purchase of pineapples, it being within the contemplation of the parties

that the pineapples were to be canned and resold at a profit, the measure of damages in an action at law for failure to sell those pineapples could have been easily and accurately ascertained, and in the present case would have been the profits which were lost by reason of the alleged breach of the contract.

It has been pointed out that the evidence shows that the pineapples in question were wanted by the Hawaiian Pineapple Company for no purpose other than for the purpose of resale after canning. It has been pointed out that the evidence further shows that there would have been no additional overhead expense in the canning of the pineapples in question and that whatever other cost might have been attendant upon the canning of these pineapples could have been easily ascertained. It further appears that the pineapples in question had in fact been resold at a perfectly definite price. The computation of damages at law would, therefore, have been a mere problem in arithmetic. The pineapples had no "*pretium afectionis*" or peculiar value to the Pineapple Company. No facts existed which would justify the action of a court of equity in decreeing the specific performance of the contract in question. Appellees cited authorities holding that equity will not by injunction cause the performance of a contract, the specific performance of which it could not decree. Appellant's only answer to this line of argument has been to contend that because other pineapples could not be procured on the open market, it, therefore, followed that damages could not be com-

puted. It is submitted that this argument is entirely without merit. The only effect which the inability to procure other pineapples could have upon the situation, would be to take out of the case the question as to whether or not the Pineapple Company had performed the duty which would otherwise have rested upon it reducing damages as much as possible by the procuring of other pineapples and by their sale under the contracts which had been made.

In its oral argument, the appellant has laid great stress upon the principle laid down in the well known case of *Hadley v. Baxendale,* 9 Exch. 341, 26 Eng. L. & Eng. 398. The rule of *Hadley v. Baxendale* goes rather to support the contention of the appellees in this connection. Baron Alderson, in rendering the decision of the court in that case, lays down the rule referred to, as follows:

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract, should be either such as may, fairly and reasonably, be considered as arising naturally and according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."

Clearly the loss of profits on a resale of the canned commodity is exactly the kind of damage which would naturally follow a breach of the contract referred to. Parties to the contract, considered as reasonably prud-

ent persons, obviously knew that the pineapples were being bought by the Canning Company for no other purposes than for resale after canning. The damage sustained would be neither remote nor uncertain. The legal remedy would have been perfectly adequate and the court in equity was, therefore, without jurisdiction to proceed.

III.

THIS COURT IS WITHOUT JURISDICTION TO HEAR AND DETERMINE THIS APPEAL BECAUSE THE JUDGMENT AND DECREE OF THE SUPREME COURT OF HAWAII APPEALED FROM WAS NOT FINAL.

On September 7th, of this year, the opinion of this court was filed in the case of *Emma F. Rumsey v. New York Life Insurance Company,* et al. (Cause number 3444 of the records of this court.) This court held, in the first place, that the form of the decree appealed from is conclusive as to the question of its finality, and, in the second place, that a decree of the Supreme Court of Hawaii, remanding the cause "for such further action, compatible to the decision as may be necessary" was not a final decree, and that no appeal would lie from such a decree. We do not see how it is possible for the court to entertain the appeal in the present case without reversing its ruling in the case referred to. The decree in the present case remanded the cause to the lower court with instructions to take such "further or other proceedings prior or subsequent to the dismissal of the bill as may be consistent with

the opinion of this court in said cause." Surely, the decree in the present case is at least as lacking in finality as was the decree in the *Rumsey* case. It may be said that it cannot be ascertained that further or other proceedings would in fact be required, but the same thing can be said with respect to the decree in the *Rumsey* case. The appellant in its oral argument has endeavored to distinguish the cases because in the present case is found the instruction "to dismiss the complainant's bill of complaint filed therein". Appellant says that the rest of the decree is mere surplusage. But, this argument is entirely without force for the reason that by slightly different form of expression the same thing is done in the *Rumsey* case. The *Rumsey* decree reversed the decree appealed from and remanded the cause with the instruction that the lower court take action compatible to the decision if such action was necessary. Obviously, one of the first duties of the lower court would be to enter its decree in conformity with the decision of the Supreme Court. Other or further proceedings prior or subsequent to the entry of such decree would be taken in the event that they were necessary. The fact that the form of the decree in the *Rumsey* case contemplated the possibility of further proceedings below was held by this court sufficient to render that form of decree lacking in such finality as to make it appealable. Exactly the same situation exists with regard to the decree appealed from in the present case.

It is a fact that in the present case further proceedings are contemplated and will have to be had in the

lower court. We will not enter into an elaboration of the character of those proceedings, for the reason that we rest our contention in this connection entirely upon the ruling of this court in the *Rumsey* case, to the effect that the court will not look beyond the form of the decree itself in determining the question of its finality.

For the convenience of the court, we are below setting opposite each other the decrees in the *Rumsey* case, and in the present case:

Decree Appealed from in Rumsey Case Held Not Final.

"The decree appealed from is reversed and the cause remanded to the Circuit Judge for such further action compatible to this decision as may be necessary."

(25 Hawaiian 141, 149.)

Decree Appealed from In Present Case.

"It is hereby ordered and decreed that the decree appealed from in the above entitled cause be, and the same is hereby, vacated and set aside, and that the permanent injunction decreed therein be, and the same is hereby, dissolved, and that the Lower Court be instructed to dismiss the complainant's Bill of Complaint filed therein, and to take such further or other proceedings prior or subsequent to the dismissal of the Bill as may be consistent with the opinion of this Court in said cause."

(Transcript, page 191.)

It is submitted that this court should follow the ruling laid down by it so recently in the *Rumsey* case and should dismiss this appeal.

In conclusion appellees contend that if this court assumes jurisdiction of the appeal, it should affirm the decree of the Supreme Court of Hawaii;

First. Because, as heretofore concluded by this court *(Hawaiian Pineapple Company v. Masamari Saito, et al.*, 260 Fed. 153, 154), the contract in question by unambiguous language had no application to pineapples or pineapple lands which might be acquired by the planter after the execution of the contract and not within the contemplation of the parties at the time that the contract was made.

Second. Because, the circumstances surrounding the execution of the contract and the acts of the parties placing construction upon it, indicate an intent to contract with respect to crops of pineapples then definitely ascertained.

In connection with the question relative to the construction of the language of the contract, the following admitted facts are particularly called to the attention of the court:

1. The contract was made upon a printed form of contract prepared by the Hawaiian Pineapple Company for use generally among planters, and contains language calculated to be applicable to various sets of circumstances.

2. Every word used in the contract is the language of the Hawaiian Pineapple Company.

3. The Hawaiian Pineapple Company, prior to the execution of the contract, noted upon the face of the

contract in writing—"Approximately 150 acres; approximately 1500 tons (Class B 200 tons)"—admittedly referring to the acreage then held by Saito at Leilehua and to the pineapple crops anticipated from that acreage.

4. The cannery capacity of the Hawaiian Pineapple Company at the time of the execution of the contract was limited, and it was necessary to contract in advance for pineapples from independent growers to such an extent as would just meet the cannery capacity.

5. The contract provided for delivery f. o. b. cars at Leilehua, near which place the 150 acres then held by Saito was located.

6. Saito was a pineapple planter only, there being nothing in the record to show that at the time of the execution of the contract, or at any time, he was a broker or person engaged in buying and selling pineapples generally.

Third. Because every rule of law governing the construction of contracts favors the construction contended by the appellees.

Fourth. Because, the trial court was without jurisdiction to grant injunctive relief, the legal remedy having been adequate.

Finally, appellees respectfully submit that this court should follow the ruling laid down by it in the case of *Rumsey v. New York Life Insurance Company* and should dismiss this appeal for the reason that this

court is without jurisdiction in the premises, the decree appealed from not being final.

Honolulu, Hawaii,
November 18, 1920.

Respectfully submitted,

THOMPSON, CATHCART & LEWIS,
BARRY S. ULRICH,
Attorneys for Appellees.

No. 3375

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,
Appellant,

vs.

FONG GIN GEE,
Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

FILED
SEP 15 1919
F. D. MONCKTON,
CLERK.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3375

United States

Circuit Court of Appeals

For the Ninth Circuit.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,
Appellant,

vs.

FONG GIN GEE,
Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Amended Petition for Writ of Habeas Corpus. 13
Assignment of Errors........................ 35
Certificate of Clerk U. S. District Court to Transcript on Appeal 43
Citation on Appeal—Copy.................. 40
Citation on Appeal—Original............... 44
Demurrer to Petition for Writ of Habeas Corpus 9
Names and Addresses of Attorneys of Record.. 1
Notice of Appeal.......................... 32
Order Allowing Appeal....... 39
Order Discharging Fong Gin Gee............ 31
Order Extending Time to Docket Case........ 46
Order of Discharge......................... 31
Order Overruling Demurrer to Petition for a Writ of Habeas Corpus............ 10
Order to Show Cause....................... 8
Order Transmitting Original Exhibits to Appellate Court 42
Petition for Appeal......................... 34
Petition for Writ of Habeas Corpus.. 3

Index. Page

Praecipe for Transcript of Record........... 1
Return to Amended Petition.................. 19
Return on Service of Writ................... 13
Stipulation as to Original Exhibit............ 41
Traverse to Return to Writ of Habeas Corpus.. 25
Writ of Habeas Corpus.... 12

Names and Addresses of Attorneys of Record.

For Respondent and Appellant:

U. S. ATTORNEY, San Francisco, Calif.

For Petitioner and Appellee:

JOSEPH P. FALLON, Esq., San Francisco, Calif., Hearst Bldg.

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,408.

In the Matter of FONG GIN GEE, on Habeas Corpus.

Praecipe for Transcript of Record.

To the Clerk of said Court:

Sir: Please make copies of the following papers to be used in preparing transcript on appeal:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Demurrer to petition.
4. Order that writ of habeas corpus issue Nov. 9, 1918.
5. Writ of habeas corpus and marshal's return of service thereof.
6. Amended petition for writ of habeas corpus.
7. Return to amended petition.
8. Traverse to return.
9. Order discharging petitioner, January 13, 1919.
10. Petition for appeal.

11. Assignment of errors.
12. Order allowing appeal.
13. Notice of appeal.
14. Citation on appeal.
15. Stipulation of attorneys and order of the Court that Respondent's Exhibits "A," being the record of the Bureau of Immigration, be transferred to the United States Circuit Court of Appeals for the Ninth Circuit, to be considered in their original form, and without being transcribed or copied.

ANNETTE ABBOTT ADAMS,
United States Attorney. [1*]

Service of the within praecipe by copy admitted this 7th day of July, 1919.

JOSEPH P. FALLON,
Attorney for Petitioner.

[Endorsed]: Filed Jul. 7, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [2]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,405.

In the Matter of FONG GIN GEE, on Habeas Corpus.

*Page number appearing at foot of page of original certified Transcript of Record.

Petition for a Writ of Habeas Corpus.

To the Honorable, the Southern Division of the United States District Court, for the Northern District of California, First Division.

The petition of Chin Lim respectfully shows:

I.

That your petitioner is a Chinese person and a resident of the city and county of San Francisco and Northern District of California.

II.

That Fong Gin Gee, the detained person, on whose behalf this petition is made, is the natural born son of Fong Cheung, a regularly domiciled Chinese merchant and resident of Woodland, California; that your petitioner makes this petition for the said detained for the reason that he is confined at Angel Island and unable to attend to the matter, and for the further reason that the father of said detained is now in Woodland, California, and has not time to appear here.

III.

That the detained and your petitioner first received word that he was to be deported from the United States on the 3d day of July, 1918; that he was also informed that said deportation would take place on the 6th day of July, 1918, on the steamer "Korea Maru." [3]

IV.

That said Fong Gin Gee is unlawfully imprisoned, detained, confined and restrained of his liberty by Edward White, Commissioner of Immigation, at the

Port of San Francisco, at the Immigration Station of the United States at Angel Island, or in some other place in the Northern District of California.

V.

That the illegality of such imprisonment, restraint, and confinement consists of this, to wit:

That the said Fong Gin Gee made application to be admitted to the United States as the minor son of a merchant; that subsequent to the said application to be so admitted to the United States the said Fong Gin Gee was by the Secretary of Labor of the United States refused and denied a fair hearing in good faith, and was by the Secretary of Labor, and the officials acting under him, by a manifest abuse of the discretion committed to them by law and against the letter and the spirit of the law, denied the right to enter the United States, and in this behalf your petitioner alleges:

That the said Fong Gin Gee, during the month of January, 1918, arrived at the port of San Francisco from China and made application to the Commissioner of Immigration at the port of San Francisco, for admission to the United States as the minor son of a merchant; that said application for admission was denied by said Commissioner of Immigration; that thereafter an appeal was taken therefrom to the Secretary of Labor and said decision of said Commissioner of Immigration was sustained by the said Secretary of Labor; that said decision was unfair and illegal in this:

1. That the said decision is not based on any discrepancies appearing in the testimony given at the hearing held in regard to said matter. [4]

2. That the evidence introduced before the Department of Labor to determine the relationship of father and son clearly established the fact that said Fong Gin Gee was the lawful minor son of Fong Cheung.

3. That there was no evidence introduced at said hearing to support the conclusion that said Fong Gin Gee is not the minor son of Fong Cheung.

4. That your petitioner is informed and believes, and therefore alleges the fact to be, that the decision of the said Secretary of Labor is not based upon any material discrepancies appearing in the testimony given at the hearing held in regard to said matter; but is based upon the erroneous conclusion that your petitioner is not a *bona fide* merchant, and in this behalf your petitioner alleges that he was duly admitted into the United States as a merchant and has never changed his status nor performed any manual labor other than that connected with the proper handling of his business and which is permitted by law.

5. That it is the duty of the said Fong Cheung, as a member of the firm of Man Hop & Company of Woodland, California, to go through the country by automobile and purchase poultry from the farmers, and your petitioner is informed and believes and therefore alleges the fact to be that the Immigration officials hold that such work is not consistant with the duties of a merchant, but, on the contrary, is the work of a laborer.

6. That your petitioner alleges that the said Fong Cheung is a *bona fide* active member of the above-named firm of Man Hop & Company and that the poultry purchased by the said Fong Cheung is sold in

the store of said company, and in the regular course of business.

7. That all of said testimony so taken and all orders and [5] findings of said Commissioner of Immigration and said Secretary of Labor and all other papers, documents and proceedings in said matter of the application of Fong Gin Gee for admission to the United States are, as your petitioner is informed and believes, and therefore alleges the fact to be, incorporated in the record of the application of the said Fong Gin Gee for admission to the United States and are now in the possession of and subject to the control of the Secretary of Labor, and all of them are now inaccessible to your petitioner and the said Fong Gin Gee; that as soon as your petitioner is able to obtain a copy of said testimony he will ask to amend this petition and make it a part hereof.

That said Fong Gin Gee, the said detained person, has exhausted all his rights and remedies and has no further remedy before the Department of Labor, and that unless the writ of habeas corpus issue out of this Court as prayed for herein, directed to Edward White, Commissioner aforesaid, in whose custody the body of said Fong Gin Gee is, the said Fong Gin Gee will be deported from the United States to China without due process of law.

WHEREFORE, your petitioner prays that a writ of habeas corpus be issued by this Honorable Court, directed to and commanding the said Edward White, Commissioner of Immigration, at the port of San Francisco, to have and produce the body of said Fong Gin Gee before this Honorable Court at its court-

room in the city and county of San Francisco, in the Northern District of California, at the opening of court on a day certain in order that the alleged cause of the imprisonment, detention, confinement and restraint of said Fong Gin Gee, and the legality or illegality thereof may be inquired into and in order that in case the said imprisonment, detention, confinement and restraint are unlawful and illegal that the said Fong Gin Gee be discharged from all custody, imprisonment, confinement and restraint.

Dated this 3d day of July, 1918.

JAMES P. FALLON,
Attorney for Petitioner. [6]

State of California,
City and County of San Francisco,—ss.

Chin Lim, being first duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that he has heard read the same and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on his information and belief and as to those matters he believes it to be true.

CHIN LIM.

Subscribed and sworn to before me this 3d day of July, 1918.

[Seal] VIRGINIA A. BEEDE,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jul. 3, 1918. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [7]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,405.

In the Matter of FONG GIN GEE, on Habeas Corpus.

Order to Show Cause.

Upon reading and filing the verified petition of Chin Lim praying for the issuance of a writ of habeas corpus,—

IT IS HEREBY ORDERED that Edward White, as Commissioner of Immigration at the port of San Francisco, at Angel Island, be and appear before the above-entitled court, Department Number One thereof, on Saturday, the 13th day of July, 1918, to show cause, if any he have, why a writ of habeas corpus should not issue in this matter and the petition granted as prayed, and this at the hour of 10 o'clock of said day; and

IT IS FURTHER ORDERED, that said Fong Gin Gee be not removed from the jurisdiction of this Court until the further order of this Court; and

IT IS FURTHER ORDERED, that a copy of this order be served upon said Edward White or such other person having the said Fong Gin Gee in custody as an officer of said Edward White.

Dated July 5, 1918.

WM. H. HUNT,
Judge.

[Endorsed]: Filed Jul. 5, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [8]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,408.

In the Matter of FONG GIN GEE, on Habeas Corpus.

Demurrer to Petition for Writ of Habeas Corpus.

Now comes the respondent, Edward White, Commissioner of Immigration at the port of San Francisco, in the State and Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

ANNETTE ABBOTT ADAMS,
United States Attorney,
C. F. TRAMUTOLO,
Asst. United States Attorney,
Attorneys for Respondent.

[Endorsed]: Filed Aug. 31, 1918. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [9]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,408.

In the Matter of FONG GIN GEE, on Habeas Corpus.

(Order Overruling Demurrer to Petition for a Writ of Habeas Corpus.)

JOSEPH P. FALLON, Esq., Attorney for Petitioner.

Mrs. ANNETTE ABBOTT ADAMS, United States District Attorney, and C. F. TRAMUTOLO, Assistant United States Attorney, Attorneys for Respondent.

ON DEMURRER TO A PETITION FOR A WRIT OF HABEAS CORPUS.

As I read the record in this case the bureau does not find that the father of the detained has no interest in the Woodland store, but bases its finding that he is

not a merchant on the fact that he buys and collects chickens from farmers throughout the country and sells and delivers them to customers in Sacramento. But it seems to me that if the firm of which the father is a member is one really dealing in poultry and eggs, receiving orders for such and sending the father out to procure and deliver them, this does not make him a peddler within the meaning of the law, even though on his trips he does occasionally solicit eggs and poultry from farmers in the first instance, or look for an occasional purchaser at Sacramento for his surplus supply.

The demurrer to the petition will be overruled and the writ prayed for will issue returnable November 9, 1918, at 10 A. M. October 30, 1918.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Oct. 30, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [10]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,408.

In the Matter of FONG GIN GEE, on Habeas Corpus.

Writ of Habeas Corpus.

The President of the United States of America, to the Commissioner of Immigration, Port of San Francisco, Calif., Angel Island, GREETING:

YOU ARE HEREBY COMMANDED that you have the body of the said person by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said person shall be called or charged, before the Honorable MAURICE T. DOOLING, Judge of the United States District Court, Northern District of California, at the courtroom of said court, in the city and county of San Francisco, California, on the 9th day of November, A. D. 1918, at 10 o'clock A. M., to do and receive what shall then and there be considered in the premises.

AND HAVE YOU THEN AND THERE THIS WRIT.

WITNESS, the Honorable MAURICE T. DOOLING, Judge of the said District Court, and the seal thereof, at San Francisco, in said District, on the 30th day of October, A. D. 1918.

[Seal] WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

JOSEPH P. FALLON,
Attorney for Petitioner. **[11]**

Return on Service of Writ.

United States of America,
Northern District of Cal.—ss.

I hereby certify and return that I served the annexed writ of habeas corpus on the therein named Commr. White of Immigration of Angel Island by handing to and leaving a true and correct copy thereof with Commr. White of Immigration, personally, at Angel Island, in said District, on the first day of November, A. D. 1918.

J. B. HOLOHAN,
U. S. Marshal.
By Frank J. Ralph,
Deputy.

[Endorsed]: Filed Nov. 4, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[12]**

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,408.

In the Matter of FONG GIN GEE, on Habeas Corpus.

Amended Petition for a Writ of Habeas Corpus.

To the Honorable, the Southern Division of the United States District Court, for the Northern District of California, First Division.

The petition of Lee Back Fon respectfully shows:

I.

That your petitioner is a Chinese person and a resident of the city and county of San Francisco and Northern District of California.

II.

That Fong Gin Gee, the detained person, on whose behalf this petition is made, is the natural born son of Fong Cheung, a regularly domiciled Chinese merchant and resident of Woodland, California; that your petitioner makes this petition for the said detained for the reason that he is confined at Angel Island and unable to attend to the matter and for the further reason that the father of said detained is now in Woodland, California, and has not time to appear here.

III.

That the detained and your petitioner first received word that he was to be deported from the United States on the 3d day of July, 1918; that he was also informed that said deportation would take place on the 6th day of July, 1918, on the steamer "Korea Maru." **[13]**

IV.

That said Fong Gin Gee is unlawfully imprisoned, detained, confined and restrained of his liberty by Edward White, Commissioner of Immigration, at the port of San Francisco, at the Immigration Station of the United States at Angel Island, or in some other place in the Northern District of California.

V.

That the illegality of such imprisonment, restraint, and confinement consists of this, to wit:

That the said Fong Gin Gee made application to be admitted to the United States as the minor son of a Chinese merchant, to wit, Fong Cheung, who is domiciled in the United States, and as such was entitled under the law to enter the United States; that subsequent to the application to be so admitted to the United States, the said Fong Gin Gee was by the Secretary of Labor of the United States refused and denied a fair hearing in good faith and was by the Secretary of Labor and the officials acting under him, by a manifest abuse of the discretion committed to them by law, and against the letter and spirit of the law, denied the right to enter the United States, and in this behalf your petitioner alleges:

That the said Fong Gin Gee, during the month of January, 1918, arrived at the port of San Francisco from China and made application to the Commissioner of Immigration at the port of San Francisco, for admission to the United States as the minor son of a Chinese merchant; that said application for admission was denied by said Commissioner of Immigration; that thereafter an appeal was taken therefrom to the Secretary of Labor and said decision of said Commissioner of Immigration was sustained by the said Secretary of Labor; that said decision was unfair and illegal in this:

1. That it is admitted by the said Immigration officials **[14]** that the said Fong Gin Gee is the lawful minor son of the said Fong Cheung, but the said Immigration officials claim the right to deny the said Fong Gin Gee the privilege to enter the United States upon the ground that the business of the said

Fong Cheung is not such as to confer upon the said Fong Cheung a mercantile status as defined by the law governing the admission of Chinese into the United States; that it is alleged by the said Immigration Officials that the manner and method pursued by the said Fong Cheung in transacting his business is not of such a character as would place him in the merchant class, and that the work so performed is not consistent with the duties of a merchant, but, on the contrary, is the work of a laborer; and therefore as a matter of law the said Fong Gin Gee has no right to enter the United States as the minor son of a Chinese merchant; on the contrary, your petitioner states that the said Fong Cheung is a *bona fide* merchant as defined by the laws governing the admission of Chinese into the United States, and in this behalf your petitioner alleges: That the said Fong Cheung, the father of said applicant, Fong Gin Gee, is a *bona fide* and active member of the firm of Man Hop & Company of Woodland, California; that it is the duty of the said Fong Cheung, as a member of the said firm, to go throughout the country by automobile and to purchase poultry from the farms; that the poultry thus purchased is sold by the said firm in the regular course of its business, and upon orders received from customers of said firm; that the work of handling said poultry by the said Fong Cheung is incident to said business of Man Hop & Company, and that the said Fong Cheung performs no labor that is not connected with the proper handling of said business and which labor is permitted by law to be performed by a Chinese merchant as an incident to

said business, and the denial of entry to the United States of the said Fong Gin Gee, as the minor son of a merchant, is [15] without the letter and the spirit of the law.

2. That all of said testimony so taken and all orders and findings of said Commissioner of Immigration and said Secretary of Labor and all other papers, documents and proceedings in said matter of the application of Fong Gin Gee for admission to the United States are, as your petitioner is informed and believes and therefor alleges the fact to be, incorporated in the record of the application of the said Fong Gin Gee for admission to the United States and are now in the possession of and subject to the control of the Secretary of Labor, and all of them are now inaccessible to your petitioner and the said Fong Gin Gee; that as soon as your petitioner is able to obtain a copy of said testimony he will ask to amend this petition and make it a part hereof.

3. That said Fong Gin Gee, the said detained person, has exhausted all his rights and remedies and has no further remedy before the Department of Labor, and that unless the writ of habeas corpus issue out of this court as prayed for herein, directed to Edward White, Commissioner aforesaid, in whose custody the body of said Fong Gin Gee is, the said Fong Gin Gee will be deported from the United States to China without due process of law.

WHEREFORE, your petitioner prays that a writ of habeas corpus be issued by this Honorable Court, directed to and commanding the said Edward White, Commissioner of Immigration, at the port of San

Francisco, to have and produce the body of said Fong Gin Gee before this Honorable Court at its courtroom in the city and county of San Francisco, in the Northern District of California, at the opening of court on a day certain in order that the alleged cause of the imprisonment, detention, confinement and restraint of said Fong Gin Gee and the legality or illegality thereof may be inquired into and in order that in case the said imprisonment, detention, confinement and restraint are unlawful and illegal that **[16]** the said Fong Gin Gee be discharged from all custody, imprisonment, confinement and restraint.

Dated this 22d day of November, 1918.

JOSEPH P. FALLON,
Attorney for Petitioner.

State of California,
City and County of San Francisco,—ss.

Lee Back Fon, being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition; that he has heard read the same and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on his information and belief, and as to those matters he believes it to be true.

LEE BACK FON.

Subscribed and sworn to before me this 22d day of November, 1918.

[Seal] VIRGINIA A. BEEDE,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 23, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[17]**

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,408.

In the Matter of FONG GIN GEE, on Habeas Corpus.

Return to Amended Petition.

Comes now Edward White, Commissioner of Immigration at the port of San Francisco, by P. A. Robbins, Immigrant Inspector, and in return to said petition for a writ of habeas corpus, admits, denies and alleges as follows:

I.

DENIES that said Fong Cheung, mentioned in the petition herein, is or ever was a regularly domiciled Chinese merchant, or a domiciled Chinese merchant, or a Chinese merchant at all in Woodland, California, or elsewhere in the said United States.

II.

DENIES that said Fong Gin Gee is unlawfully imprisoned, detained, confined and restrained, or un-

lawfully imprisoned, or detained, or confined, or restrained of his liberty by the said Edward White, Commissioner of Immigration at the port of San Francisco, or by any other person or persons whatever at the Immigration Station, of the United States at Angel Island, or elsewhere, or at all so imprisoned, or detained, or confined, or restrained, but in this connection alleges the fact, respecting the detention and confinement and restraint of said Fong Gin Gee to be:

That said Fong Gin Gee in the month of January, 1918, made application to be admitted to the United States, claiming to be the minor son of a Chinese merchant domiciled in the United States and doing business at a fixed place, to wit, as the minor son of one Fong Cheung. [18]

That thereafter, the claim of said Fong Gin Gee under his said application was investigated by the Immigration Service of the United States, Department of Labor, wherein the said Fong Gin Gee and all persons and attorneys in his behalf were in good faith given and accorded a full and fair hearing before the Commissioner of Immigration, in which all the oral and documentary evidence was introduced and affidavits admitted in support of applicant's claim.

That thereafter, and on the 13th day of February, 1918, after fully and fairly considering the evidence adduced and submitted in behalf of applicant, the said Commissioner of Immigration notified the said applicant, his counsel and the Consul General of China that the claimed mercantile status and rela-

tionship of said Fong Cheung, as claimed by applicant, had not been established and on said last mentioned date afforded said applicant an opportunity to furnish and submit additional evidence within a period of ten days.

That thereafter, and on the 27th day of February, 1918, additional evidence was by applicant presented to said Commissioner in support of his application.

That thereafter, to wit, on the 4th day of March, 1918, and after fully and fairly considering all the evidence so presented, the application of said Fong Gin Gee was by the Honorable Edward White, Commissioner of Immigration, aforesaid, denied and notice thereof immediately given to said Fong Gin Gee, his attorney and the Consul General of China.

That thereafter, to wit, March 6th, 1918, an appeal from the decision of said Commissioner of Immigration was taken and perfected to the Honorable Secretary of Labor and the record transmitted.

That said Fong Gin Gee was there and on said appeal to and before said Secretary of Labor, represented by his counsel that a **[19]** hearing upon said appeal was duly and regularly had, and in addition to the evidence theretofore given, the said Fong Gin Gee was afforded the opportunity to, and did present other further and all the evidence in support of his said application and a full and fair hearing in good faith was then and there given said applicant before the said Secretary of Labor, and the evidence being closed, the cause was argued orally and by written brief by applicant's attorney, and thereupon the cause was submitted to said Secretary of Labor

for his consideration and decision; whereupon, after careful consideration of all the evidence presented, the decision of the said Commissioner of Immigration denying applicant the right to enter the United States was, by the Honorable John W. Abercrombie, Acting Secretary of Labor, approved on the 27th day of June, 1918, and the said Fong Gin Gee ordered deported.

DENIES that the said Fong Gin Gee was, by the said Secretary of Labor, or at all, refused or denied a fair hearing in good faith, or that the said Fong Gin Gee was by a manifest, or any abuse of discretion, committed by law, or otherwise, to said Secretary of Labor, or the officials, or either, or any of them acting under him, denied the right to enter the United States, but to the contrary, alleges that the said Fong Gin Gee was denied the right to enter the United States after a full and fair hearing upon a consideration of all the evidence presented, and the said Secretary of Labor, in the exercise of the discretion committed to him, decided that the said Fong Gin Gee had failed to establish the existence of his right to enter the United States.

DENIES that the said decision of the Commissioner of Immigration, or the said decision of the Secretary of Labor, was unfair or illegal.

DENIES that the said Fong Cheung, father of the said applicant, **[20]** is a *bona fide* Chinese merchant, or a Chinese merchant at all, as defined by, or within the meaning of the laws governing the admission of Chinese into the United States.

DENIES that the said Fong Cheung is a *bona fide*

or acting member of said firm of Man Hop & Company, but alleges the fact to be that the said Fong Cheung, for two years prior to, and at the time claimed and alleged that he became a member of said firm of Man Hop & Company, was a huckster or peddler, to wit, engaged in going about the country purchasing and selling poultry, and that there has been no cessation but a continuing of said work of huckstering or peddling in the same way by the said Fong Cheung at the time of, and ever since his alleged membership in said firm of Man Hop & Company, and that his connection with, and membership in the said firm of Man Hop & Company, if any, was an incident to his labor and business as huckster or peddler, and that the said denial of entry to the United States of the said Fong Gin Gee upon the said facts disclosed by the evidence and incorporated in the record thereof, was within the discretion of the said Secretary of Labor.

DENIES that the record ever was, or is now inaccessible to petitioner, but alleges that the said record was at all times available and accessible to petitioner.

As a further, separate and distinct answer and defense to the said petition herein, respondent alleges that the question as to the right of said Fong Gin Gee to enter and remain in the United States under his said application was one of fact, the examination and determination of which is by law committed to the Commissioner of Immigration and Secretary of Labor and that upon a full and fair hearing thus had in good faith, the decision of the said Secretary of

Labor is by law made final.

That the said hearings, as conducted, and the testimony and **[21]** all evidence taken by the Immigration officials and Secretary of Labor acting for and in behalf of the Government of the United States have been recorded in a record known as the original record in the case of Fong Gin Gee of the Bureau of Immigration, and that the said testimony, evidence and all exhibits offered, introduced and considered, and with the record, are by reference incorporated into and made a part of this answer and return and filed herewith.

WHEREFORE, respondent prays that the said petition be denied and said Fong Gin Gee be remanded to the custody of respondent and deportation and for such other and further relief as to this Court seems equitable and just.

ANNETTE ABBOTT ADAMS,
United States Attorney.
BEN F. GEIS,
Asst. United States Attorney. **[22]**

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

P. A. Robbins, being first duly sworn, deposes and says: That he is a Chinese and Immigrant Inspector connected with the Immigration Service for the port of San Francisco and has been specially directed to appear for and represent the respondent, Edward White, Commissioner of Immigration, in the within entitled matter; that he is familiar with all the facts set forth in the within return to the amended petition

for writ of habeas corpus and knows the contents thereof; that it is impossible for the said Edward White to appear in person or to give his attention to said matter; that of affiant's knowledge the matters set forth in the return to the amended petition for a writ of habeas corpus are true, excepting those matters which are stated on information and belief and that as to those matters he believes it to be true.

P. A. ROBBINS.

Subscribed and sworn to before me this 30th day of November, 1918.

[Seal] C. M. TAYLOR,

Deputy Clerk of the United States District Court, Northern District of California.

[Endorsed]: Filed Nov. 30, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [23]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,408.

In the Matter of FONG GIN GEE, on Habeas Corpus.

Traverse to Return to Writ of Habeas Corpus.

Comes now Lee Back Fon, the petitioner herein, and files this, his traverse to the return of the respondent Edward White, Commissioner of Immigration for the port of San Francisco, and in traversing generally said return your petitioner does hereby deny each

and every, all and singular, the material allegations and averments contained in said return, which are at variance with or different from or inconsistent with each, any, some or all of the material averments or allegations contained in said petition for a writ of habeas corpus, and your petitioner does hereby reaffirm and reallege each and every, all and singular, the material allegations and averments contained in the petition for a writ of habeas corpus herein, with the same force and effect, and to all intents and purposes as if said material allegations and averments and each and all of them were now fully set forth at length in words and figures in this traverse, and further and specifically traversing said return, your petitioner does now admit, deny, affirm and allege as follows, to wit:

I.

Your petitioner traversing subdivision 1 of said return, contained in lines 16 to 20, inclusive, page 1 of said return, reaffirms and realleges, to wit: That the said Fong Cheung, the father of the applicant for admission, Fong Gin Gee, is a domiciled **[24]** Chinese merchant, and a *bona fide* and active member of the firm of Man Hop and Company, of Woodland, California.

II.

Your petitioner traversing the first paragraph of subdivision 11, lines 22 to 32, inclusive, page 1, of said return, reaffirms and realleges the restraint and confinement of the said Fong Gin Gee, is in every way unlawful.

Your petitioner traversing the second paragraph

of subdivision 11, commencing at line 33, page 1, to and including line 4, page 2, of said return, admits that the said Fong Gin Gee made application to be admitted to the United States as the minor son of a Chinese merchant domiciled in the United States and doing business at a fixed place, to wit, the minor son of his father, Fong Cheung.

Your petitioner traversing the 3d, 4th, 5th and 6th paragraphs of subdivision 11, lines 5 to 31, inclusive, page 2, of said return, admits that the application of the said Fong Gin Gee was investigated by the Immigration Service of the United States Department of Labor, but denies that said investigation was conducted by said officials in good faith, and reaffirms and realleges that said applicant, Fong Gin Gee, was not given a full and fair hearing, nor was any legal evidence or any evidence of any kind produced to support the charge or charges that the said Fong Cheung, father of said applicant, was not a *bona fide* Chinese merchant.

Your petitioner traversing the 7th, 8th, 9th, 10th and 11th paragraphs, commencing at line 31, page 2, to and including line 3, page 4, admits that an appeal from the decision of the Commissioner of Immigration was taken to the Secretary of Labor, by said applicant, but reaffirms and realleges that said Fong Gin Gee was denied and refused a fair hearing in good faith, such as is guaranteed by law; and said denial of the right of said Fong Gin Gee to admission to the United States was an abuse of the discretion committed to each, [25] or any, or all of the persons before whom the matter was considered.

Your petitioner traversing the 12th paragraph, lines 7 to 11, inclusive, page 4, of said return, reaffirms and realleges that the said Fong Cheung, father of said applicant, is a *bona fide* Chinese merchant, as defined by and within the meaning of the laws governing the admission of Chinese into the United States.

Your petition traversing the 13th paragraph, lines 12 to 29, inclusive, page 4, reaffirms and realleges that the said Fong Cheung, the father of the said applicant, Fong Gin Gee, is a *bona fide* and active member of the firm of Man Hop & Company, Woodland, California; reaffirms and realleges that said firm deals in poultry; that it is the duty of the said Fong Cheung, as a member of the said firm, to go about the country by automobile and to purchase poultry from the farmers; that the poultry thus purchased is sold by the said firm in the regular course of business, and upon orders received from customers of said firm; that your petitioner reaffirms and realleges that the work of handling said poultry by the said Fong Cheung is incident to said business of the Man Hop and Company, and reaffirms and realleges that the said Fong Cheung performs no labor that is not connected with the proper handling of said business and which labor is permitted by law; and your petitioner further answering said return, alleges that the record referred to in said 13th paragraph, and which is made a part of the said petition for a writ of habeas corpus, does not disclose the fact that the said Fong Cheung had no interest in said store of Man Hop and Company, but, on the contrary, that the Bureau of

Immigration bases its findings on the fact that the said Fong Cheung, because he buys poultry, thereby performs labor inconsistent with that required of a merchant; your petitioner reaffirms and realleges that said finding was an abuse of discretion, and without the letter and spirit of the law. [26]

That your petitioner traversing the 14th paragraph, lines 30 to 32, page 4, of said return, reaffirms and realleges that at the time of filing said petition for a writ of habeas corpus, the record of the Immigration Service was inaccessible to petitioner.

Your petitioner further traversing paragraph 15, lines 1 to 9, inclusive, of said return, admits that the Secretary of Labor is the sole judge of the fact as to the kind of work performed by said Fong Cheung, provided said findings of fact are based upon substantial evidence and not upon mere suspicion and conjecture, but reaffirms and realleges that whether such work so performed is inconsistent with the duties of a merchant is one of law and not of fact, and the decision of the said Secretary of Labor on a matter of law is not final.

Your petitioner traversing the 16th paragraph, lines 10 to 19, inclusive, page 5, admits that all the proceedings relative to said matters before the Department of Labor have been recorded in a record known as the original record, and said record was upon hearing of demurrer filed herein, made a part of the original petition for a writ of habeas corpus.

WHEREFORE, your petitioner prays that the writ of habeas corpus herein issued in this matter be

made final, and that the detained alien go hence without day.

JOSEPH P. FALLON,
Attorney for Petitioner. [27]

State of California,
City and County of San Francisco,—ss.

Lee Back, on being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition; that the same has been read and explained to him, and he knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

LEE BACK FON.

Subscribed and sworn to before me this 4th day of December, 1918.

[Seal] VIRGINIA A. BEEDE,
Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Dec. 5, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [28]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,408.

In the Matter of FONG GIN GEE, on Habeas Corpus.

(Order Discharging Fong Gin Gee.)

JOSEPH P. FALLON, Esq., Attorney for Petitioner.

Mrs. ANNETTE ABBOTT ADAMS, United States District Attorney, and C. F. TRAMULTOLO, Assistant United States Attorney, Attorneys for Respondent.

The question involved herein was decided by the Court upon demurrer. Nothing new is presented, and it is therefore ordered that the detained Fong Gin Gee be discharged.

January 13, 1919.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Jan. 13, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [29]

In the Southern Division of the District Court of the United States, Northern District of California, First Division.

No. 16,408.

In the Matter of FONG GIN GEE, on Habeas Corpus.

Order of Discharge.

This matter having been regularly brought on for hearing upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been thereon had, it is by the Court

now here ORDERED, that the said named person in whose behalf the writ of habeas corpus was sued out is illegally restrained of his liberty, as alleged in the petition herein, and that he be, and he is hereby discharged from the custody from which he has been produced, and that he go hence without day.

Entered this 13th day of January, A. D. 1919.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk.

[Endorsed]: Filed Jan. 13, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [30]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,408.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,
Appellant,

vs.

FONG GIN GEE,
Appellee.

Notice of Appeal.

To the Clerk of theAbove-entitled Court, to Fong Gin Gee and to Joseph P. Fallon, Esq., His Attorney.

You and each of you will please take notice that Edward White, Commissioner of Immigration at the

port of San Francisco, appellant herein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from an order and judgment made and entered herein on the 13th day of January, 1919, setting aside the return to the petition for a writ of habeas corpus, and discharging the said Fong Gin Gee from the custody of the said Edward White, Commissioner of Immigration at the port of San Francisco, and appellant herein.

Dated this 3d day of July, 1919.

ANNETTE ABBOTT ADAMS,
United States Attorney,
BEN F. GEIS,
Assistant United States Attorney,
Attorneys for Appellant.

Service of the within notice of appeal by copy admitted this 3d day of July, 1919.

JOSEPH P. FALLON,
Attorney for Petitioner.

[Endorsed]: Filed Jul. 3, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [31]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,408.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellant,

vs.

FONG GIN GEE,

Appellee.

Petition for Appeal.

To the Honorable M. T. DOOLING, Judge of the District Court of the United States for the Northern District of California.

Edward White, as Commissioner of Immigration at the port of San Francisco, appellant herein, feeling aggrieved by the order and judgment made and entered in the above-entitled cause on the 13th day of January, 1919, discharging Fong Gin Gee from the custody of said appellant, does hereby appeal from said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith.

WHEREFORE, petitioner prays that his appeal be allowed and that citation be issued, as provided by law, and that a transcript of the record, proceedings and documents, and all of the papers upon which said order and judgment were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such Court, and in accordance with the law in such case made and provided.

Dated this 3d day of July, 1919.

ANNETTE ABBOTT ADAMS,
United States Attorney,
BEN F. GEIS,
Asst. United States Attorney. [32]

Service of the within petition for appeal by copy admitted this 3d day of July, 1919.

JOSEPH P. FALLON,
Attorney for Petitioner.

[Endorsed]: Filed Jul. 3, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [33]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,408.

EDWARD WHITE, as Commissioner of Immigration, at the Port of San Francisco,

Appellant,

vs.

FONG GIN GEE,

Appellee.

Assignment of Errors.

Comes now Edward White, Commissioner of Immigration at the port of San Francisco, respondent in the above-entitled cause, and appellant in the appeal to the United States Circuit Court of Appeals for the Ninth Circuit, taken herein by his attorneys, Annette A. Adams, United States Attorney, and Ben F. Geis, Assistant United States Attorney, and files the following assignment of errors upon which he will rely in the prosecution of his appeal in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, from the

order and judgment made by this Honorable Court on the 13th day of January, 1919.

I.

That the Court erred in granting the writ of habeas corpus and discharging the alien Fong Gin Gee from the custody of Edward White, Commissioner of Immigration at the port of San Francisco.

II.

That the Court erred in holding that it had jurisdiction to issue the writ of habeas corpus in the above-entitled cause as prayed for in the petition of said Fong Gin Gee for a writ of habeas corpus.

III.

That the Court erred in holding that the allegations contained in said petition for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus. [34]

IV.

That the Court erred in finding that the evidence upon which the Secretary of Labor issued the order of deportation for the said Fong Gin Gee was insufficient in character.

V.

That the Court erred in holding that Fong Gin Gee was unlawfully imprisoned, detained, confined and restrained of his liberty by Edward White, Commissioner of Immigration at the port of San Francisco and that the evidence taken at the hearings of said case before the Immigration officials under the Chinese Exclusion Act was insufficient to justify the said respondent Edward White, to hold, detain or deport the said Fong Gin Gee.

VI.

That the Court erred in holding that Fong Cheung, the alleged father of the said Fong Gin Gee was a lawfully domiciled Chinese merchant.

VII.

That the Court erred in not holding that Fong Cheung was a Chinese laborer within the meaning of the Chinese Exclusion Laws.

VIII.

That the Court erred in holding that Fong Gin Gee was entitled to admission into the United States as the minor son of a lawfully, domiciled merchant, to wit, as the son of Fong Cheung.

IX.

That the Court erred in determining as a question of fact that Fong Cheung was a lawfully domiciled Chinese merchant as against the decision of the Secretary of Labor of the United States that the said Fong Cheung was not a lawfully domiciled Chinese merchant. **[35]**

X.

That the Court erred in holding there was no evidence showing that Fong Cheung was a laborer.

XI.

That the Court erred in holding there was an abuse of discretion on the part of the Commissioner of Immigration and the Secretary of Labor, in denying the said Fong Gin Gee the right to enter the United States.

XII.

The Court erred in holding that the hearing accorded the said Fong Gin Gee was unfair.

WHEREFORE, appellant prays that the said order and judgment of the United States District Court, for the Northern District of California, made and entered herein, in the office of the clerk of said court, on the said 13th day of January, 1919, setting aside the return to the petition for a writ of habeas corpus, and discharging the said Fong Gin Gee from the custody of Edward White, Commissioner of Immigration, be reversed, and that the said Fong Gin Gee be remanded to the custody of said Commissioner of Immigration.

Dated this 3d day of July, 1919.

ANNETTE ABBOTT ADAMS,
United States Attorney,
BEN F. GEIS,
Assistant United States Attorney,
Attorneys for Appellant.

Service of the within assignment of errors by copy admitted this 3d day of July, 1919.

JOSEPH P. FALLON,
Attorney for Petitioner.

[Endorsed]: Filed Jul. 3, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [36]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,408.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellant,

vs.

FONG GIN GEE,

Appellee.

Order Allowing Appeal.

On motion of Annette A. Adams, United States Attorney, and Ben F. Geis, Assistant United States Attorney, attorneys for appellant in the above-entitled cause,—

IT IS HEREBY ORDERED, that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment of January 13, 1919, heretofore made and entered herein, be, and the same is, hereby allowed, and that a certified transcript of the records, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, in the manner and time prescribed by law.

Dated this 3d day of July, 1919.

E. S. FARRINGTON,

Judge of the District Court.

Service of the within order allowing appeal, by copy admitted this 3d day of July, 1919.

JOSEPH P. FALLON,
Attorney.

[Endorsed]: Filed Jul. 3, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [37]

(Citation on Appeal—Copy.)

UNITED STATES OF AMERICA,—ss.

To Fong Gin Gee and to His Attorney, Joseph P. Fallon, Esq., GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, First Division, wherein Edward White as Commissioner of Immigration for the port of San Francisco, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD S. FARRINGTON, United States District Judge for the

Northern District of California, this 3d day of July, A. D. 1919.

E. S. FARRINGTON,
United States District Judge.

Service of the within citation by copy admitted this 3d day of July, 1919.

JOSEPH P. FALLON,
Attorney.

[Endorsed]: Filed Jul. 3, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [38]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,408.

In the Matter of FONG GIN GEE, on Habeas Corpus.

Stipulation (as to Original Exhibit).

It is hereby stipulated and agreed by and between the respective parties in the above-entitled cause that the records of the Immigration Service, which were filed in the above-entitled court as Respondent's Exhibits "A," and which were made a part of respondent's return to the petition for a writ of habeas corpus in said cause, may be transferred, in their original form and without being transcribed or copied, to the United States Circuit Court of Appeals for the Ninth Circuit, and the said records of the Immigration service are and may there be considered as a part of

respondent's return to the said petition for a writ of habeas corpus, and the record in determining this cause on appeal to the said United States Circuit Court of Appeals for the Ninth Circuit, without objection on the part of either of the said respective parties.

ANNETTE ABBOTT ADAMS,
United States Attorney,
BEN F. GEIS,
Assistant United States Attorney,
Attorneys for Appellee.
JOSEPH P. FALLON,
Attorney for Petitioner.

[Endorsed]: Filed Jul. 3, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. **[39]**

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,408.

In the Matter of FONG GIN GEE, on Habeas Corpus.

Order Transmitting Original Exhibits to Appellate Court.

It appearing to the Court that it is both necessary and proper that the records of the Immigration Service referred to in the above stipulation should be inspected in the United States Circuit Court of Appeals for the Ninth Circuit, in determining the ap-

peal of the said cause the same having been filed and considered as stated in this court,—

IT IS THEREFORE ORDERED that the said records be transferred in their original form by the clerk of this court to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to be retained by said clerk until the appeal in the above-entitled cause is properly disposed of, at which time the same are to be returned to the clerk of the above-entitled court.

July 3d, 1919.

E. S. FARRINGTON,
U. S. District Judge.

[Endorsed]: Filed Jul. 3, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [40]

Certificate of Clerk U. S. District Court to Transcript on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing —— pages, number from 1 to ——, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the Matter of Fong Gin Gee, on Habeas Corpus, No. 16,408, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript of record (copy of which is embodied in this transcript) and the instruc-

tions of the attorney for respondent and appellant herein.

I further certify that the cost for preparing and certifying the foregoing Transcript on Appeal is the sum of nine dollars and eighty-five cents ($9.85).

Annexed hereto is the Original Citation on Appeal issued herein (page 42).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 12th day of August, A. D. 1919.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [41]

(Citation on Appeal—Original.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Fong Gin Gee and to His Attorney, Joseph P. Fallon, Esq., GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Southern Division, First Division, wherein Edward White, as Commissioner of Immigration for the port of San Francisco, is appellant, and you are appellee, to show cause, if any there

be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD S. FARRINGTON, United States District Judge for the Northern District of California, this 3d day of July, A. D. 1919.

E. S. FARRINGTON,
United States District Judge. [42]

Service of the within citation by copy admitted this 3d day of July, 1919.

JOSEPH P. FALLON,
Attorney.

[Endorsed]: No. 16,408. United States District Court, for the Northern District of California, Southern Div., First Div. Edward White, Commissioner of Immigration, Appellant, vs. Fong Gin Gee. Citation on Appeal. Filed Jul. 3, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.

[Endorsed]: No. 3375. United States Circuit Court of Appeals for the Ninth Circuit. Edward White, as Commissioner of Immigration for the Port of San Francisco, Appellant, vs. Fong Gin Gee, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District

Court for the Northern District of California, First Division.

Filed August 12, 1919.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

No. 16,408.

In the Matter of FONG GIN GEE, on Habeas Corpus.

Order Extending Time to Docket Case.

Good cause appearing therefor, and upon motion of Ben F. Geis, attorney for the appellant herein,—

IT IS HEREBY ORDERED that the time within which the above-entitled case may be docketed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit may be and the same hereby is extended for a period of thirty days from and after the 3d day of August, 1919.

Dated San Francisco, California, August 1, 1919.

W. H. HUNT,

United States Circuit Judge.

[Endorsed]: No. 16,408. In the Southern Division of the District Court of the United States for the Northern District of California, First Division. In the Matter of Fong Gin Gee, on Habeas Corpus. Order Extending Time to Docket Case. No. 3375. Filed Aug. 1, 1919. F. D. Monckton, Clerk. Refiled Aug. 12, 1919. F. D. Monckton, Clerk.

No. 3375

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco, *Appellant,* vs. FONG GIN GEE, *Appellee.*	

APPELLANT'S BRIEF.

ANNETTE ABBOTT ADAMS,
United States Attorney,

BEN F. GEIS,
Asst. United States Attorney,
Attorneys for Appellant.

FILED
OCT 1 . 19
F. D. MONCKTON

No. 3375

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco, *Appellant,*	
vs.	
FONG GIN GEE, *Appellee.*	

BRIEF FOR THE GOVERNMENT.

Statement of the Case.

Fong Gin Gee, appellee, arrived at the port of San Francisco, California, on the S. S. "Korea Maru" January 14th, 1918, and made application to the Immigration authorities for admission to the United States, claiming to be the minor son of one Fong Cheung, who it was claimed, was a lawfully

domiciled Chinese merchant, a member of the firm of Man Hop and Company of Woodland, California.

The application of said Fong Gin Gee to enter the United States was denied by the Commissioner of Immigration for the port of San Francisco on the grounds "that the mercantile status and relationship is not established to my satisfaction."

From said Commissioner's excluding decision, an appeal was taken to the Secretary of Labor who, after a careful review of all the evidence, affirmed the said excluding decision "on the ground that the alleged father has not satisfactorily established that he is a merchant within the meaning of the law," and directed said Fong Gin Gee's deportation.

From said Secretary's excluding decision, a petition for writ of habeas corpus was filed (Tr. Rec. p. 3) and an order to show cause issued returnable July 13th, 1919 (Tr. Rec. p. 8). A demurrer to said petition was filed (Tr. Rec. 9) which was overruled and writ directed to issue returnable November 9th, 1918 (Tr. Rec. 10-12). An amended petition was filed November 23rd, 1919 (Tr. Rec. p. 13) and return thereto was filed November 30th, 1918 (Tr. Rec. p. 19) and traverse to said return filed December 5th, 1918 (Tr. Rec. p. 25).

The cause was submitted on briefs, and on January 13th, 1919, the following order discharging the said Fong Gin Gee from the custody of said Commissioner of Immigration was made and filed:

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF CALIFORNIA, FIRST DIVISION.

No. 16,408.

In the Matter of FONG GIN GEE, on Habeas Corpus.

ORDER DISCHARGING FONG GIN GEE.

JOSEPH P. FALLON, Esq., Attorney for Petitioner,

MRS. ANNETTE ABBOTT ADAMS, United States District Attorney, and

C. F. TRUMUTOLO, Assistant United States Attorney, Attorneys for Respondent.

The question involved herein was decided by the Court upon demurrer. Nothing new is presented, and it is therefore ordered that the detained Fong Gin Gee be discharged.

January 13, 1919.

M. T. DOOLING,
United States District Judge.

It is from said order discharging the said Fong Gin Gee that this appeal is taken.

That the proceedings had were in accordance with the Chinese Exclusion Acts, and the rules applicable thereto, is not questioned, but unfairness during the proceedings, and abuse of discretion wherein a wrong decision was arrived at, is the contention of appellee, while the Government on the other hand, takes the opposite view. The issue then, is clean cut.

The Government also contends that the decision of the Secretary of Labor as made, is final, and release on habeas corpus should have been denied.

FINALITY OF DECISION.

Section 19 of the Act of February 5th, 1917, provides as follows:

> "In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, *the decision of the Secretary of Labor shall be final.*"

Under the well established rule of construction of statutes, there is but one road open to the construction of the clear and unambiguous meaning of the underscored words. There will be found no variance in its meaning as defined by lexicographers. To contend that a decision is final, and not final, is to utter a paradox. Finality of decision must be

lodged somewhere, and that it may be given by law, to executive, administrative and judicial officers, needs no citation of authorities. When the question is one not determinable by an exact science, and the decision of the person to whom the question is committed, is by law made final, without qualification of any kind, we contend that it is final, whether that finality is thus lodged in and with an executive, administrative, or judicial officer.

In *Yamataya vs. Fisher,* 189 U. S. 97; 47 L. Ed. 725, the Court says:

> "The constitutionality of the legislation in question, in its general aspect, is no longer open to discussion in this court. That Congress may exclude aliens of a particular race from the United States, prescribe the terms and conditions upon which certain classes of aliens may come to this country, establish regulations for sending out of the country such aliens as come here in violation of law, *and commit* the enforcement of such provisions, conditions and regulations, *exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this Court.*"
>
> "Now it has been settled that the power to exclude or expel aliens belonged to the political department of the government, and that the order of an executive officer invested with the power to determine finally the facts upon which an alien's right to enter the country, or remain

in it depended, was 'due process of law' and no other tribunal unless expressly authorized to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency."

149 U. S. 698;
158 U. S. 538;
163 U. S. 228;
198 U. S. 263;
185 U. S. 296.

In 158 U. S., 536 *supra,* (39 L. Ed. 1082), the

Court announces this doctrine:

"The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms or conditions upon which they may come to this country, and to have its declared policy in that regard enforced *exclusively* through executive officers without judicial intervention, is settled by our previous adjudications."

And in 158 U. S. 296; 48 L. Ed. 917, it is said:

"Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention, and this has been for many years the recognized and declared policy of the country."

In *Ekiu vs. U. S.,* 142 U. S. 660, the Court says:

"And Congress may, if it sees fit, as in the statutes in question, authorize the courts to investigate and ascertain the facts on which the right to land depends. But on the other hand, the final determination of those facts may be entrusted by Congress to executive officers, and in such cases, as in all others in which a statute gives a discretionary power to an officer, to be

exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted.

"It is not within the province of the judiciary to order that foreigners who have never been naturalized nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of the executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."

In *Lou Wah Suey vs. Backus,* 225 U. S. 460; 56 L. Ed. 1167, which seems to be the latest case in point, the court, speaking through Mr. Justice Day, says:

"A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were *manifestly* unfair, that the action of the executive officers *was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute.* In other cases the order of the

> executive officers within the authority of the statute is final. *U. S. vs. Ju Toy,* 198 U. S. 253; 49 L. Ed. 1040; 25 Sup. Ct. Rep. 644; *Chin Yow vs. U. S.,* 208 U. S. 8, 52 L. Ed. 369; 28 Sup. Ct. Rep. 201; *Tang Tum vs. Edsell,* 223 U. S. 673."

Obviously the question is: 1st. Were the proceedings in the case at bar *manifestly unfair,* to wit, such as to prevent a fair investigation? and 2nd: Was there a *manifest* abuse of the discretion committed to them by statute?

AS TO UNFAIRNESS.

In this connection we fully believe that the Court will find, by an examination of the record, that every opportunity for the presentation of evidence in support of applicant's claim was given. There is no intimation that all the witnesses applicant could produce were not produced and given full opportunity to testify. In each instance the main witnesses were asked, "Have you anything further to state?" or, "Is there anything more you would like to state?" thus affording opportunity for unlimited statement, and in each instance the answer was "No."

The case having been closed on February 13th, 1918, it was *re-opened,* and additional evidence, to wit, affidavit of five witnesses permitted and considered on behalf of applicant. Then followed the

appeal to the Secretary of Labor. After considering the evidence presented by the record on appeal and an affirmance of the decision of the Commissioner of Immigration, the case was *again re-opened,* and further testimony taken and the cause was *again re-argued* by applicant's counsel and the former decision was again affirmed. With such a record we submit the contention of applicant "that Fong Gin Gee was refused or denied a fair hearing in good faith" is wholly without support. There was due process of law, no constitutional right of applicant denied him, nor in any way invaded.

DOES THE RECORD DISCLOSE MANIFEST ABUSE OF DISCRETION?

Discretion—when applied to judges or public functionaries— means a liberty, power or right conferred upon them by law, of acting officially in certain circumstances within the confines of right and justice, according to the dictates of their own conscience, uncontrolled by the judgment or conscience of others, and independent of narrow and unbending rules of positive law, to decide and act in accordance with what is fair and equitable on the peculiar circumstances of the case and as discerned by his personal wisdom and experience, guided by the spirit, principles and analogies of the law.

Abuse of discretion is defined by Corpus Juris as follows:

> "A discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence; a clearly erroneous conclusion and judgment—one that is clearly against the logic and effect of such facts as are presented in support of the application, against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing." 1 C. J. 372.

ABUSE JUSTIFYING INTERFERENCE.

> "The 'abuse of discretion,' to justify interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. 29 Ind. A. 395; 62 N. E. 107-111."
>
> 1 C. J. 372.
>
> "The exercise of an honest judgment, however erroneous it may appear to be, is not an abuse of discretion. Abuse of discretion and especially gross and palpable abuse of discretion, which are terms ordinarily employed to justify an interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. 29 N. Y. 418, 431."
>
> 1 C. J. 372.
>
> "Difference in judicial opinion is not synonymous with abuse of judicial discretion. 62 N. J. L. 380, 383."
>
> 1 C. J. 372.

Fong Cheung presented as one of his witnesses

to prove his status as a merchant, one J. L. Aronson, who was in the store almost every day.

J. L. ARONSON, (p. 7 Rec.)

> "Fong Cheung told me he gathered up chickens through the country. I never had any business or transaction with him in the store. I do not know whether he is engaged as a merchant or peddler. I never heard that Fong Cheung was a partner in the store."

When it is remembered that the testimony shows that this gathering up of chickens was the identical business of Fong Cheung for about *two years before* his alleged connection with the firm (Ex. A p. 17) and the failure of the witness to support the merchant status of Fong Cheung, for which he was produced, the testimony of this witness supports the decision of the Secretary of Labor, rather than tending to support applicant.

W. L. PROVOST (p. 8 Rec.)

> "I visit the store *once* a week to make purchases. Most of the time Fong Cheung is there. Have had transactions with him. In my observation he is a partner in this store. He *appears* to be the outside man; he goes to camps and has groceries and their baggage. I have never seen him peddling chickens. I have sold him some."

From this he concludes that Fong Cheung is a merchant, and not a laborer, although he says that he

would not be in a position to know whether he had performed other labor, unless it had been performed in his vicinity.

This witness visited the store but *once* a week, and then only to make purchases, and that Fong Cheung was there most of the time when he visited the store. This would indicate that some weeks he did not see him at all. If the status of a Chinese merchant can be built up and sustained upon that character of testimony, it would not be difficult to establish it for all Chinese. But even this testimony stands contradicted.

FONG BA testified (p. 18 Rec.): "W. L. Provost visited the store *almost every day.*"

This testimony was for the purpose of showing that Provost had much opportunity of knowing Fong Cheung's status to be that of a merchant.

W. L. PROVOST testified (p. 8 Rec.): "I visited the store *once a week.*"

Can it be said that such an occasional visit is sufficient knowledge on the part of the witness to even afford a guide to those who were to determine the status of Fong Cheung as a merchant?

In any event, these contradictions could, in the mind of the examining officers, destroy the testimony of both; at least, the officers would have the right to discredit both.

J. A. WOOD (p. 9 Rec.).

> "Fong Cheung has been a partner in this store for a year and a half. Sometimes I visit the store every day, sometimes not so often. I have been selling these gentlemen chickens, and come and buy some of them. He gets orders from the country. Goes out gets them —brings some in here for the store and takes some to Sacramento. *He does not spend very much of his time in handling poultry.* Most of the time when I come he is in the store. I am in a position to testify that he is a bona fide merchant and not a laborer and not a peddler."

It sometimes happens that the very positiveness in which a witness testifies to the existence of material facts, condemns it.

We apprehend that it will not be disputed, at least not sucessfully, that the method of answering questions, the actions and demeanor of a witness, when testifying, is taken into account and considered by the Judge or official before whom the witness testifies. It is one of the tests applicable to all witnesses, in weighing the evidence given by them. This witness, it is plain, sought to minimize Fong Cheung's connection with, and the time he spent in, the poultry business, and have him in the store as much as possible, but in doing so, he also destroyed the force and effect his evidence might otherwise have had, but is Wood's statement in harmony with

the real facts or is he making wild and careless statements, to assist Fong Cheung.

Facts as to What Portion of Fong Cheung's Time Was Spent in Handling Poultry

J. A. WOOD, (p. 8 Rec.): "Not very much."

FONG CHEUNG, (p. 16 Rec.): "Average about *three* or *four days a week.*"

This is not only a contradiction of Wood but shows that from one-half to two-thirds of Fong Cheung's time is spent in handling chickens.

We also find in the record (p. 72) that in addition to the days he is away, Fong Ba testifies that Fong Cheung is gone in his chicken business "from *two to three nights a week.*" Q. What else does Fong Cheung do *besides handling chickens?* A. He delivers goods to different camps *for the firm.* Plainly then, his principal business is buying and selling chickens, and he is away from the store most of the time.

The record discloses that he was in the chicken business before he had any connection whatever with the store, and he continued it in practically the same way after his alleged connection with the firm. The occasional times he was or is in the store are merely incident to his continued poultry business,

and serves as an outward appearance, to the public, of his being a merchant, and lends some color upon which to secure white witnesses to testify to his merchant status when required, and necessary to land a son, but when analyzed in the light of the real facts and circumstances, it does not measure up to the test.

This question of *principal* business, when applied to one claiming to be a merchant, is well exemplified in *Lai Moy vs. U. S.* 66 Fed. 955. The facts disclosed that Lai Moy was a member of the firm of Lum Chong Bro. Co., dealers in dry goods, clothing and also manufacturers of pants and coats, etc. In his examination for admission as a merchant, upon his return from a visit to China, he was refused admission. The reasons for refusal were based on the following testimony:

> "Q. Are you a clothes cutter?
> A. Yes, I understand it.
> Q. Was not that your principal business?
> A. That and selling goods.
> Q. Did you make clothes other than to cut them?
> A. Sometimes.
> Q. What do you mean by that?
> A. Well, *if we were in a rush,* any one of us would take a hand on the sewing machine.
> Q. What portion of your time were you cut-

ting and making clothing during the last year before you went to China?

A. I suppose *nearly equally divided.*"

In that case it is held, that the fact that Lai Moy, even when the firm of which he was a member *was in a rush,* worked *one-half* his time on garments they were actually selling at a *fixed* place of business, was a laborer.

Here we have Fong Cheung, who was a member of a firm dealing in general merchandise, devoting *three-fourths of his time* in going about the country buying chickens and selling them, as he says, to restaurants, markets and stores *in Sacramento,* the store being located in Woodland. True, he says that occasionally he would, if he got back to Woodland late, unload the chickens and then go to Sacramento in the morning, but he bought, as Fong Ba says, "anywhere on the ranches in the country" and sold in Sacramento. Fong Cheung was as much a peddler as was Lai Moy, a cutter or maker of clothing, and the result of the work Lai Moy performed was done in and sold at *their fixed place of business,* and it was apparently no more essential that Fong Cheung go out in the country and look for chickens, than for Lai Moy, when his firm was rushed, to work in securing the commodity they were selling. True there is a distinction, but the difference is

against Fong Cheung. Doubtless Lum Chong Bro. & Co. could have conducted their business without Lai Moy doing what he did, but the same is true of the work Fong Cheung performed. For it is a matter of common knowledge that poultry merchants *buy and sell* poultry at their *fixed* place of business.

In 184 Fed. 687, the Court says:

> "It was perhaps impossible to enumerate all the classes of occupation of the general nature of those mentioned, but the act clearly intends to make a distinction between merchants who buy and sell at a *fixed place of business* and those who sell goods which they have purchased to vend in *no* fixed place of business."

Section 2 of the Act of November 3, 1893, reads in part as follows:

> "Sec. 2. The words 'laborer' or 'laborers' wherever used in this act, or in the act to which this is an amendment, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, *huckstering, peddling,* laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation.
>
> "The term 'merchant,' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at *a fixed place of business,* which business is conducted in his

> name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

The statute places hucksters and peddlers in the category of laborers. Fong Cheung surely was a huckster or peddler for two years prior to the time he claims to have become interested in the firm of Man Hop and Company, and since that time he has been following identically the same line of business, to wit, buying and selling chickens. Conceding that he has an interest of $500 in the firm as claimed, that does not mean that he is a merchant within the meaning of the law, for to be a merchant he must be "engaged in *buying* and *selling* merchandise, at a *fixed* place of business." This the record shows, he does not do, but to the contrary, that he does all his buying and selling apart and away from the store,—the buying from the farmers throughout the surrounding country, and the selling to various stores and restaurants in Sacramento.

Contradictions as to Where Chickens are Sold.

WOOD testifies (p. 9 Rec.):

"Fong Cheung brings some in here *for the store* and takes some to Sacramento. I go to the store and buy some chickens of them."

FONG BA testifies (p. 73 Rec.):

"We sell *all* our chickens to Chinese and American *markets in Sacramento.* We sell to *restaurants*—markets. I don't know what res-

taurants we sell to. Fong Cheung keeps track of all the different places. (p. 18 Rec.) Wood comes here *two* or *three* times a week to buy and sell chickens. Fong Cheung sells him chickens."

FONG CHEUNG testifies (p. 16 Rec.): Q. What do you do with that poultry? A. We sell them to the stores in *Sacramento.* Q. Do you sell *all* of your chickens *in Sacramento?* A. *Yes.* Q. Do you ever sell *any* in Woodland? A. *No.*

Here we have not only clear and explicit contradiction, but positive declaration that Fong Cheung was buying and selling chickens, neither the buying nor the selling being at a *fixed* place of business.

Other Contradictions and Discrepancies.

FONG CHEUNG testifies (p. 16 Rec.):

"The firm transacts *no business except at the store.*

"The farmers come in to the store and sell their poultry." (p. 16 Rec.).

"We dispose of our poultry to Quong Foon, Nom Sing, Wing Hop and Fong Hing." (p. 75 Rec.).

FONG CHEUNG testifies (p. 15 Rec.):

"The firm has no interest in any ranch or ranches."

(p. 15 Rec.) The assets of the firm are:

Goods on hand, close to $1000
Debts due us a little over $1000
Close to $3000
Cash on hand $400 to $500
One machine, a little over $300
That is all. (p. 16 Rec.).

FONG CHEUNG testifies (p. 75 Rec.):

"Sometimes we have orders for chickens and no farmers come and ask us to buy. So I go out and hunt for some."

"I buy my poultry in the neighborhood of Woodland, Knights Landing and Black Station." (p. 75 Rec.).

FONG BA testifies:

"We sell to American and Chinese markets and restaurants."

FONG BA testifies (p. 19 Rec.):

"The firm owns one-half interest in a ranch."

The assets of the firm are:

Goods on hand about $700
Debts due the firm close to....................$3000
Cash on hand about $500
One machine, a little over $400
One-half interest in truck $500
That is all.

It is beyond belief that if Fong Cheung was a bona fide member of the firm he would be wholly ignorant and know nothing at all of the interest in the ranch, and particularly when the testimony of Fong Ba clearly shows that they have had four men working on this ranch for *seven or eight months.* (p. 19 Rec.).

In addition to what has been here shown, we call the Court's attention to the many discrepancies in the testimony pointed out by Immigrant Inspector Hannum on pages 22, 23, 24, 33, 34, 35, 36 and 37 of the record, and also the reference made by Hons. A. Caminetti and J. W. Abercrombie. (pp. 62, 63, 64, 65, 77, 78, 79, 80 and 88 of the record).

IS THERE ANY EVIDENCE TO SUPPORT THE FINDING OF THE SECRETARY OF LABOR? IF SO, THEN UNDER THE DECISIONS THE EXCLUDING DECISION OF THE SECRETARY OF LABOR SHOULD HAVE BEEN SUSTAINED BY THE DISTRICT COURT.

Fong Ba testifies, (p. 73 Rec.):

> "We sell *all* our chickens to Chinese and American markets in Sacramento. We sell to restaurants—markets. I don't know what restaurants we sell to. Fong Cheung keeps track of all the different places."

Fong Cheung testifies:

"The farmers come in the store and sell their poultry. I go out and look them over and buy them. We sell them to the stores in Sacramento. I take them to Sacramento by machine. I average 3 or 4 days a week. (Rec. p. 16).

"Q. Why should they (Henley's) say that you come there to inquire about poultry? A. Sometimes we have orders for chickens and no farmers come and asks us to buy chickens, so I have to go out and hunt for some.

Q. Do you sell *all* of your chickens in Sacramento?

A. Yes.

Q. Do you ever sell *any* in Woodland? A. No.

Q. Do you deliver them *all* in Sacramento in the machine?

A. Yes. (p. 75 Rec.).

The evidence clearly shows that none of the poultry is either bought or sold at the Woodland store but that Fong Cheung buys direct from the farmers in the surrounding country and sells them to various customers in Sacramento. When asked "Where do you buy your poultry?" Fong Cheung replied "In the neighborhood of Woodland, Knights Landing and Blacks Station." (p. 75 Rec.).

The record shows that Fong Cheung was for several years a buyer and peddler of chickens before he invested in the Woodland firm. "Q. What occupation did you follow before coming to Woodland? A. I went out through the country and bought poultry

and sold to the different stores. (p. 17 Rec.)." Surely it cannot be said that he is buying and selling goods at a fixed place of business.

This evidence, coupled with his lack of knowledge concerning the general business and assets of the firm, leads to but one conclusion, to wit, that he is not a merchant within the meaning of the Chinese Exclusion Acts, and that his claimed status as such, was colorably acquired for the sole purpose of bringing into the country his son, Fong Gin Gee.

This court, speaking through his Honor, Judge Morrow, in *White vs. Gregory,* 213 Fed. 768-770, says:

> "In reaching this conclusion the officers gave the aliens the hearing provided by the statute. This is as far as the court can go in examining such proceedings. It will not inquire into the sufficiency of probative facts, or consider the reasons for the conclusions reached by the officers."

Again, in *Lee Ah Yin vs. U. S.,* 116 Fed. 614, 615, this court speaking through his Honor, Judge Gilbert, held, that

> "There were inconsistencies in the evidence which may well have caused the commissioner and the court to doubt its truth, and there were circumstances which tended to impeach the evidence of the plaintiff in error. We cannot say that the judgment was clearly against the weight of the evidence."

From the many discrepancies and contradictions disclosed by the record, there is in fact little left upon which applicant could hope to sustain his claim, and on the other hand, there is much to lend support to the conclusion reached by the Immigrant Inspector, the Commissioner of Immigration, the Commissioner General and the Secretary of Labor. This is particularly forceful when it is remembered that the officer conducting the examinations are men trained in such investigations; the witnesses were before them, observed their manner and method of testifying, their demeanor on the stand, and all the many things that throw light upon and furnish a guide to courts, juries and all officers having jurisdiction to make investigations and hear evidence as to the real, as well as probable truth or falsity of the witnesses' statements. All this cannot be and is not disclosed by a cold record. When all these matters are considered, we respectfully submit that if there is any discretion committed to these officers at all, then the conclusion reached and the decision rendered, that Fong Cheung is not a bona fide merchant, doing business at a fixed place, should not have been disturbed, and particularly on habeas corpus.

Had the petition alleged facts showing that applicant was prevented from producing witnesses, or

being produced, were denied the right to give evidence to establish his right to enter the United States, and thereby denied a fair hearing, as in the case of *Chin Low vs. United States,* 208 U. S., page 8, then quite a different rule would obtain. In the case just referred to, petitioner alleged that he was prevented by the officials of the Commissioner from obtaining witnesses whose evidence would have proven his right of entry. The Court in that case says:

> "The question is, whether he is entitled to habeas corpus in such a case. If the petitioner was *not denied* a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. These facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts open the merits of the case, whether those facts are proved or not. And by way of caution, we may add that jurisdiction *would not be established* simply by proving that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced. But supposing that it could be shown to the satisfaction of the District Judge that the petitioner had been allowed nothing but the semblance of a hearing, as we assume to be alleged, the question is, we repeat, whether habeas corpus may not be used to give the petitioner *the hearing that he has been de-*

> *nied.* But unless and until it is proved to the satisfaction of the judge that a hearing, properly so called, *was denied*, the merits of the case are not open."

We take this to be the true rule, and earnestly insist that the record clearly shows that applicant was not denied the opportunity of a fair hearing, but was granted an exceptionally liberal, full and fair hearing.

Petitioner's real contention is that the decision of the Secretary of Labor *is wrong.* We feel that it is unnecessary to again advert to the evidence disclosed in the record, and its discrepancies and contradictions. Under such conditions the sifting process and the discretion therein is committed to certain officers, and even if, in the exercise of their discretion, they arrive at a conclusion, which is susceptible of a different conclusion, it cannot be said to be wrong. In support of our contention in this, we call this Court's attention to the case of *Chin Low vs. U. S. supra,* wherein the Court employs this significant language: "The denial of a hearing *cannot be established by proving that the decision was wrong.*" In other words, a fair hearing does not depend upon the decision, but the decision, to be final, depends upon a fair hearing having been accorded applicant.

We are not unmindful of the District Court's decision on the demurrer in the case at bar, but in deference thereto, have gone into the voluminous record and pointed out matters that may have escaped the Court's notice, and have cited the principal authorities, although there are many others of the same import, and we feel that it is not the all-important matter or thing that this, or any one particular applicant, will or will not be permitted to land his son, but the decision of this Court herein will have a far greater significance, which needs no elucidation.

Respectfully submitted,

ANNETTE ABBOTT ADAMS,

United States Attorney,

BEN F. GEIS,

Asst. United States Attorney,

Attorneys for Appellant.

No. 3375

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commissioner of Immigration, for the Port of San Francisco, *Appellant*, vs. FONG GIN GEE, *Appellee*.	}

BRIEF FOR APPELLEE.

JOSEPH P. FALLON,
Attorney for Appellee.

Filed
OCT 2 5 1919
F. D. Monckton,
Clerk.

No. 3375

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commissioner of Immigration, for the Port of San Francisco, *Appellant*, vs. FONG GIN GEE, *Appellee.*	}

BRIEF FOR APPELLEE.

The opening statement of the case by the appellant is correct with the exception that it is not made clear what the final decision of the Secretary of Labor was in the matter. It is true that the Commissioner of Immigration for the Port of San Francisco denied the appellee admission to the United States on the grounds "that the mercantile status and relationship is not established to my satisfaction". An appeal was taken from that decision and the Secretary of Labor denied the application on the single ground "that the alleged father has not satisfactorily established that he is a merchant within the meaning of the law".

The discrepancies appearing in the testimony and upon which the Commissioner of Immigration at the Port of San Francisco concluded that the relationship of father and son had not been established to his satisfaction were so trivial in the judgment of the Secretary of Labor that he could not, in good conscience, find that the relationship did not exist, and it was conceded by the appellant that the appellee was in truth and fact the son of Fong Chung. The Secretary, however, held that the said Fong Chung had not established the fact that he was a merchant within the meaning of the law.

The appellant on pages four to eight, of its brief, devotes considerable argument to the finality of the decision of the executive officers, contending that the Secretary of Labor is the final judge of the facts, and the Court is without jurisdiction to intervene. We admit that the Secretary of Labor is the sole judge of the facts and his decision is final, provided his findings of fact are based upon substantial evidence and not upon mere suspicion and conjecture, but in applying the law to those facts his judgment is not final, and that he cannot arbitrarily, mistakenly and erroneously make a wrong application of the law.

> Whitfield v. Hanges, 222 Fed. 745;
> McDonald v. Sier Tak Sam, 225 Fed. 710;
> Ex parte Sam Pui, 217 Fed. 456;
> Ex parte Chan Kam, 232 Fed. 855;
> Ex parte Owe Sam Goon, ~~230~~ 235 Fed. ~~654.~~ 849

In the instant case it was admitted that the appellee is the lawful son of Fong Chung; that the said Fong Chung has an interest in the Man Hop Company of Woodland, California; that the said company has a fixed place of business; that said company, as a department of its business, deals in poultry; that orders are taken from customers and that the same are delivered to said customers, and the sole question involved is whether the work done by the said Fong Chung is work consistent with the duties of a merchant, and the Secretary having clearly found what the duties of the said Fong Chung were in connection with the business of the Man Hop Company, it is one of law and not of fact as to whether those duties are inconsistent with his status as a merchant, and the decision of the Secretary of Labor on a matter of law is not final.

The District Court had the entire record of the case before it and Judge Dooling stated in reference to the facts, the following:

> "As I read the record in this case, the Bureau does not find that the father of the detained has no interest in the Woodland store, but bases its finding that he is not a merchant on the fact that he buys and collects chickens from farmers throughout the country and sells and delivers them to customers in Sacramento. But it seems to me that if the firm of which the father is a member, is one really dealing in poultry and eggs, receiving orders for such and sending the father out to procure and deliver them, this does not make him a pedlar within the meaning of the law, even though on his trips he does occasionally solicit eggs and

> poultry from farmers in the first instance, or look for an occasional customer at Sacramento for his surplus supply."

The question here involved is whether the work performed by the said Fong Chung brings him within the purview of the statute as a merchant.

The Act of November 3, 1893, 2 Supp. Rev. St. U. S. page 154, provides as follows:

> "The term merchant as employed herein and in the acts of which this is amendatory shall have the following meaning, and none other: A merchant is a person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

The Circuit Court of Appeals for the Ninth Circuit, in the case of Ow Yang Dean v. U. S., 145 Fed. 801, in speaking on this point said:

> "We are led to inquire, therefore, what is the meaning of the statute, and what labor may be said to be necessary in the conduct of the appellant's business? In the ordinary business of a merchant no manual labor whatever is necessary. The statute contemplates that a Chinese merchant may do manual labor. The restriction is that it shall be such labor as is necessary in the conduct of his business as a merchant. The statute should receive a reasonable construction. If the appellant was permitted to engage in manual labor in connection with his business, we see no reason for holding that the work which he did, as fairly estab-

lished by the evidence, was not such work as was necessary."

Ow Yang Dean v. U. S. 145 Fed. 801;
U. S. v. Sun, 76 Fed. 450;
Lee Kan v. U. S., 62 Fed. Rep. 914.

In the instant case the facts are substantially as follows, and not disputed by the appellant, to wit: Fong Chung is a member of the Man Hop Company; that the Man Hop Company conducts a business at a fixed place; that they deal in poultry and that Fong Chung attends to the poultry business for the firm. These facts being conceded, the only question involved is whether the work done by the said Fong Chung is work incident to and necessary to the carrying on of said business. The District Court had the entire record before it, examined the evidence carefully, and came to the conclusion that it was necessary to the proper conduct of the business of the Man Hop Company, and clearly established the status of the said Fong Chung as a merchant as defined by the law.

We respectfully urge that the judgment of the District Court be sustained.

Dated, San Francisco,
October 22, 1919.

JOSEPH P. FALLON,
Attorney for Appellee.

No. 3375

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commissioner of Immigration, for the Port of San Francisco, *Appellant,* vs. FONG GIN GEE, *Appellee.*	

APPELLEE'S PETITION FOR A REHEARING.

JOSEPH P. FALLON,
Hearst Building, San Francisco,
Attorney for Appellee and Petitioner.

FILED
JUL 30 1920
F. D. MONCKTON,
CLERK.

No. 3375

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commissioner of Immigration, for the Port of San Francisco,

Appellant,

vs.

FONG GIN GEE,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellee respectfully petitions that the decision of this Court herein be set aside and that a rehearing of the cause be granted.

The ground of the application is that the unfairness and abuse of discretion on the part of the Immigration Officials in the proceeding consists of this:

That while their judgment of the facts is conclusive, provided the same is founded on substantial evidence and not mere conjecture and suspicion, yet having once found the facts, the application of the law to those facts is a matter of law of which the Court is bound to take cognizance.

UNFAIRNESS.

The Court in its opinion, after stating that the Immigration Officials are the sole judges of the facts, proceeds to discuss the facts of the case and finally determines that the Secretary of Labor's decision to the effect that the appellee's father was not a merchant, but a mere peddler, or huckster, is final and the Court cannot interfere with said decision. In support of this position, the Court quotes from the decision in the case of Lai Moy v. United States, 66 Fed. 955, to the effect that a

> "Chinese person, who, during half of his time is engaged in cutting and sewing garments for sale by a firm of which he is a member, is engaged in manual labor not necessary in the conduct of his business, and is not a merchant within the meaning of the Statute".

We respectfully submit that this is not the situation in the instant case. The purpose of the Chinese Exclusion and Restriction Acts is to prevent competition between Oriental and American labor. The cutting and sewing of garments consists in the manufacturing and changing of one form of commodity

into that of another and must necessarily be consummated by the exercise of manual labor. In the instant case it is admitted that the Man Hop Company is a business conducted at a fixed place and in one of its departments deals in poultry and eggs, and in every particular fully complies with the law. In order to conduct that business or any business of that nature there must be buying and selling and delivery of the goods so bought and sold. There is no change, however, in the form of the commodities sold. This, as pointed out in many decisions is not such labor to prevent which the Chinese Exclusion Law was enacted. It is pointed out in the decision that the appellee's father is ignorant of certain features of the business of the Man Hop Company, and that fact would indicate that he was not a bona fide member of said company. This is not unusual in Chinese mercantile establishments, nor is it even unusual in American mercantile establishments for the partners to be unfamiliar with all departments of the business. It is to be noted that the Immigration Officials do not find that the appellee's father has no interest in the store, but contend that the work he performs is that of a laborer.

The facts as conceded by the Immigration Officials are that the appellee's father is a member of the Man Hop Company and that said company conducts a business at a fixed place; that they deal in poultry; that orders are taken by the firm and the poultry delivered by the appellee's father. Surely that work is necessary to the conduct of the business

and being necessary to the conduct of the business it is a matter of law that he is a merchant. To assume that because he was once a peddler, he is always to remain such in the face of the facts as found, is certainly unfair and contrary to the law.

For the foregoing reasons, we earnestly and respectfully urge the Court to grant this petition for a rehearing.

Dated, San Francisco,
July 28, 1920.

JOSEPH P. FALLON,
Attorney for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for the appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
July 28, 1920.

JOSEPH P. FALLON,
Of Counsel for Appellee and Petitioner.

No. 3377

United States

Circuit Court of Appeals

For the Ninth Circuit.

LIM CHAN,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

FILED

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3377

United States
Circuit Court of Appeals
For the Ninth Circuit.

LIM CHAN,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Assignment of Errors.......................... 21
Certificate of Clerk U. S. District Court to Transcript on Appeal 25
Citation on Appeal 27
Demurrer to Petition for Writ of Habeas Corpus 12
Motion for Release on Bail.................. 15
Names of Attorneys of Record............. 1
Notice of Appeal.......................... 18
Order Allowing Petition for Appeal........... 22
Order Extending Time to Docket Case—Dated May 16, 1919.......................... 31
Order Extending Time to Docket Case—Dated June 14, 1919.......................... 29
Order Extending Time to Docket Case—Dated July 14, 1919.......................... 30
Order Releasing on Bail.................. 14
Order to Show Cause.......................... 11
Order Submitting Demurrer to Petition....... 14
Order Sustaining Demurrer to Petition for Writ 17
Petition for Appeal.......................... 19
Petition for Writ of Habeas Corpus........... 2
Praecipe for Transcript on Appeal............ 1
Stipulation and Order Respecting Withdrawal of Immigration Record.................. 24

Names of Attorneys of Record.

For Petitioner and Appellant:

HEIM GOLDMAN, Esq., and GEO. A. McGOWAN, Esq., Both of San Francisco.

For Respondent and Appellee:

U. S. ATTORNEY, San Francisco.

In the District Court of the United States, in and for the Northern District of California, Southern Division, First Division.

No. 16,404.

In the Matter of LIM CHAN, (16742/4–12 Ex. SS. "NIPPON MARU," December 8, 1917), on Habeas Corpus.

Praecipe (for Transcript on Appeal).

To the Clerk of said Court:

Sir: Please make up transcript of appeal in the above-entitled case, to be composed of the following papers, to wit:

1. Petition for writ (omitting Exhibit "A").
2. Order to show cause.
3. Demurrer.
4. Minute order introducing immigration record at the hearing on demurrer.
5. Motion for an order to release on bail.
6. Order for release on bail.
7. Judgment and order.
8. Notice of appeal.
9. Petition for Appeal.

10. Assignment of errors.
11. Order allowing appeal.
12. Stipulation and order respecting immigration record.
13. Citation on appeal.
14. Clerk's certificate.

HEIM GOLDMAN,
GEO. A. McGOWAN,
Attorneys for Petitioner.

[Endorsed]: Filed Aug. 12, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [1*]

In the District Court of the United States, in and for for the Northern District of California, Southern Division, First Division.

In the Matter of LIM CHAN, (16742/4–12 Ex. SS. "NIPPON MARU," December 8, 1917), on Habeas Corpus.

Petition for Writ of Habeas Corpus.

To the Honorable United States Circuit or District Judge, Now Presiding in the Above-entitled Court.

It is respectfully shown by the petition of Lim Kee that Lim Chan, hereafter in this petition referred to as "the detained," is unlawfully imprisoned, detained, confined and restrained of his liberty by Edward White, Commissioner of Immigration for

*Page-number appearing at foot of page of original certified Transcript of Record.

the port of San Francisco, at the Immigration Station at Angel Island, County of Marin, State and Northern District of California, Southern Division thereof; that the said imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to wit:

That it is claimed by the said Commissioner that the said detained is a Chinese person and an alien not subject or entitled to admission into the United States under the terms and provisions of the Acts of Congress of May 6th, 1882; July 5th, 1885; September 13th, 1888; May 5th, 1892; November 3d, 1893; and April 29th, 1902, as amended and re-enacted by Section 5 of the Deficiency Act of April 7th, 1904, which said acts are commonly known and referred to as the Chinese Exclusion or Restriction Acts; and that he, the said Commissioner, intends to deport the said detained away from and out of the United States to the Republic of China. **[2]**

That the said Commissioner claims that the said detained arrived at the port of San Francisco on or about the 8th day of December, 1917, on the SS. "Nippon Maru," and thereupon made application to enter the United States as the minor son of your petitioner, who is a resident Chinese merchant, lawfully domiciled within the United States of America, and that the application of the said detained to enter the United States upon said grounds was denied by the said Commissioner of Immigration, and that an appeal was thereupon taken from the excluding decision of the said Commissioner of Immigration to the

Secretary of the Department of Labor, and that the said Secretary thereafter dismissed the said appeal; that it is admitted by the said Commissioner of Immigration that the said detained was admissible into the United States under the Acts of Congress approved February 5th, 1917, commonly known as the General Immigration laws. That it is claimed by the said Commissioner that in all of the proceedings had herein the said detained was accorded a full and fair hearing; that the action of the said Commissioner and the said Secretary was taken and made by them in the proper exercise of the discretion committed to them by the statute in such cases made and provided, and in accordance with the regulations promulgated under the authority contained in said statutes.

But, on the contrary, your petitioner on his information and belief alleges that the hearing and proceedings had herein, and the action of the said Commissioner and the action of the said Secretary was and is in excess of the authority committed to them by the said rules and regulations and by the said statute, and that the denial of the said application of the said detained to enter the United States as the minor son of a resident Chinese merchant lawfully domiciled within the United States was and is an abuse of the authority committed to them by the said statutes in each of the following particulars hereinafter set forth. **[3]**

FIRST: Your petitioner alleges that the said Commissioner and the said Secretary have, as a result of their investigation, found and determined that the

detained the said Lim Chan is a person of the Chinese race and is a minor, that is, a person under twenty-one years of age, and that your petitioner, Lim Kee, is a resident Chinese merchant, lawfully domiciled within the United States of America, and that he is a member of the Continental Co., which is a firm engaged in buying and selling merchandise at a fixed place of business at No. 1540 Broadway, in the city of Oakland, State of California, and that he has been such Chinese merchant for more than one year prior to the application of said detained to enter the United States. That during said time your petitioner, Lim Kee, has engaged in the performance of no manual labor, save and except only such duties as were incumbent upon him in his conduct as such merchant, and that the said facts attesting the mercantile status of your petitioner, the said Lim Kee, have been established to the satisfaction of the said Secretary and the said Commissioner by the testimony of two credible witnesses other than Chinese and by personal investigation and examination of your petitioner the said Lim Kee, the manager of the said Continental Co., and a personal inspection and examination of the store and place of business of the said Continental Co., but the said Secretary and the said Commissioner have assigned as a reason for the denial of the application of the said detained to enter the United States their contention that the relationship claimed by the said detained to your petitioner has not been established by the evidence submitted upon his behalf to their satisfaction, but that in all other respects and in all other matters and things

the said detained was otherwise admissible to residence within the United States of America. [4]

Your petitioner alleges upon his information and belief that the evidence presented before the said Commissioner and the said Secretary upon the application of the said detained to enter the United States upon the question of relationship of father and son existing between your petitioner and the said detained, which consists of the testimony of the said detained, of your petitioner, and of a further witness, Lim Yin Hawn, was of such a conclusive kind and character establishing the existence of said relationship, and hence showing that the detained was the minor son of your petitioner, and which said evidence was, your petitioner alleges upon his information and belief, of such legal weight and sufficiency, that it was an abuse of discretion on the part of the said Commissioner and the said Secretary to find or conclude or be of the opinion that the said relationship of father and son did not exist between your petitioner and the said detained, and to thereupon deny the said detained the right of admission into the United States, and to refuse to be guided by said evidence. That the said adverse action of the said Commissioner and the said Secretary was, your petitioner alleges upon his information and belief, arrived at and was done in denying the said detained the fair hearing and consideration of his case to which he was entitled, and that the said action was done and taken therefor in excess of the discretion committed to the said Secretary and to the said Commissioner of Immigration, and your petitioner fur-

ther alleges upon his information and belief that the said action of the said Secretary and the said Commissioner was influenced against the said detained and against the said witnesses appearing upon his behalf solely because of their being of the Chinese race. In this connection your petitioner alleges that it was shown and conceded to be by the evidence presented before the said Commissioner and the said Secretary, that your petitioner had entered the United States in 1903, and that [5] your petitioner was, therefore, residing in China at a time to permit his paternity of the said detained to be possible, and further, that when your petitioner arrived in the United States in 1903, he was then asked by the Immigration authorities and stated that he was married, and that he had two daughters, and one son (this reference being to the detained herein then about 5 years old) then living in China, but that the Immigration authorities did not at said time and place see fit to ask your petitioner their names and ages. That thereafter, and upon the return of your petitioner from a second visit to China on July 3d, 1916, the Immigration authorities thereupon examined your affiant with respect to his family in China, and he enumerated the members of his family including this detained. That as a result of and during the examination of the detained to enter the United States the Inspector made a comparison between your petitioner and the said detained for the purpose of observing whether there was a physical resemblance between them, and found as a result thereof "expression of eyes somewhat similar," and

as a result of the appearance of the witnesses herein before the Inspector who conducted the examination, the said Inspector found that the demeanor of all the witnesses during said examination was "O. K.," and further as a result of his investigation upon the point as to whether or not any of the said witnesses were substantially discredited before the Immigration office he found and reported that they were not so discredited to his knowledge.

And your petitioner alleges upon his information and belief that in addition to the foregoing facts and in support thereof, the evidence presented consisting of the testimony of the detained, of your petitioner and of the said Lim Yin Hawn was in connection therewith so conclusive as a matter of law, that to disregard the same was an arbitrary and unwarranted action, and your petitioner hereby refers to the said evidence which is hereinafter referred to as Petitioner's Exhibit "A," with the same force **[6]** and effect as if set forth in full herein.

That your petitioner has in his possession a full copy of the testimony submitted upon the examinations of the case of said detained at the office of the said Commissioner of Immigration, together with a copy of the Inspector's abstract of record and report, and a copy of the final decision rendered herein by the said Commissioner, and that the same is filed separately herewith as Petitioner's Exhibit "A." That your petitioner has not a copy of the proceedings had before the Secretary of Labor, and that no copy thereof is within the jurisdiction of this court, and for said reason it is impossible for your petitioner to ob-

tain a copy thereof to present herewith. That your petitioner stipulates that when the original of said record is brought before this court that the same may be presented and filed and considered as an exhibit accompanying this petition.

That it is the intention of the said Commissioner of Immigration to deport the said detained out of the United States and away from the land of which your petitioner, his father, now enjoys a permanent domicile, by the SS. "Nankin," sailing from the port of San Francisco on or about June 29th, 1918, at about 1 o'clock of said day, and unless this court intervenes to prevent said deportation, your petitioner will be deprived of his right to have his said minor son take up his residence with your petitioner within the United States.

That the said detained is in detention, as aforesaid, and for said reason is unable to verify this petition on his own behalf, and for said reason this petition is verified by your petitioner for himself, and for and on behalf of his said minor son, as the act of himself and as the act of his said minor son, the detained herein.

WHEREFORE, your petitioner prays that a writ of habeas [7] corpus issue herein as prayed for directed to the said Commissioner, and directing him to hold the body of the said detained within the jurisdiction of this court, and to present the body of the said detained before this court at a time and place to be specified in said order together with the time and cause of his detention, so that the same may be inquired into to the end that the said detained may be permitted to enter the United States and take up his

residence therein with your petitioner, and be accorded his liberty of residence within the United States as the minor son of a resident Chinese merchant lawfully domiciled therein, and that he may go thence and thereafter without day.

Dated San Francisco, California, June 29th, 1918.

LIM KEE,
Petitioner.

GEO. A. McGOWAN,
HEIM GOLDMAN,
Attorneys for Petitioner. [8]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

Lim Kee, being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition; that the same has been read and explained to him and he knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

LIM KEE.

Subscribed and sworn to before me this 1st day of July, 1918.

[Seal] CHARLES EDELMAN,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 7, 1922.

[Endorsed]: Service of the within petition for a writ of habeas corpus and the order to show cause issued thereon and receipt of copies thereof is hereby admitted this 2d day of July, 1918.

JNO. W. PRESTON,
U. S. Atty.
P. A. ROBBINS,
For Commissioner of Immigration.

Filed Jul. 2, 1918. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [9]

In the District Court of the United States, in and for the Northern District of the State of California, Division No. 1.

#16404.

In the Matter of LIM CHAN (16742/4-12 ex. SS. "NIPPON MARU," December 8, 1917), on Habeas Corpus.

Order to Show Cause.

Good cause appearing therefor, and upon reading the verified petition on file herein, it is hereby ordered that Edward White, Commissioner of Immigration for the port and district of San Francisco, appear before this court on the 6 day of July, 1918, at the hour of 10 o'clock of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued as herein prayed for, and that a copy of this order be served upon the said Commissioner.

AND IT IS FURTHER ORDERED that the said Edward White, Commissioner of Immigration aforesaid, or whoever, acting under the orders of said Commissioner, or the Secretary of Labor, shall have the custody of the said Lim Chan, are hereby ordered and directed to retain the said Lim Chan within the custody of the said Commissioner of Immigration, and within the jurisdiction of this court until its further order herein.

Dated San Francisco, California, July 2, 1918.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Jul. 2, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[10]**

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,404.

In the Matter of LIM CHAN (16742/4–12 ex SS. "NIPPON MARU," December 8, 1917).

Demurrer to Petition for Writ of Habeas Corpus.

Now comes the respondent, Edward White, Commissioner of Immigration at the Port of San Francisco, in the State and Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

ANNETTE ABBOTT ADAMS,
United States Attorney,
C. F. TRAMUTOLO,
Asst. United States Attorney,
Attorneys for Respondent.

[Endorsed]: Filed Sep. 7, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [11]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the Courtroom thereof, in the city and county of San Francisco, State of California, on Saturday, the 7th day of September, in the year of our Lord one thousand nine hundred and eighteen. Present: The Honorable MAURICE T. DOOLING, Judge.

No. 16,404.

In the Matter of LIN CHAN on Habeas Corpus.

(Order Submitting Demurrer to Petition.)

This matter came on regularly this day for hearing on order to show cause as to the issuance of a writ of habeas corpus herein. Geo. A. McGowan, Esq., was present for and on behalf of petitioner and detained. C. F. Tramutolo, Esq., Assistant United States Attorney, was present for and on behalf of respondent, and filed demurrer to petition, and all parties consenting thereto, it is ordered that the Immigration Records be filed as Respondent's Exhibit "A" and that the same be considered as part of the original petition. After argument by the respective attorneys, the Court ordered that said matter be submitted. [12]

In the District Court of the United States, in and for the Northern District of California, Division No. 1.

In the Matter of LIM CHAN (16742/4–12 ex SS. "NIPPON MARU," December 8, 1917) Habeas Corpus.

Order Releasing on Bail.

Good cause appearing therefor, and on motion of George A. McGowan, Esquire, attorney for the detained herein,—

IT IS HEREBY ORDERED that the said detained may be released on bail upon his giving a bond in the sum of One Thousand Dollars ($1,000), conditioned that he shall remain and abide by whatever judgment is finally entered herein, and that he

shall render himself in execution thereof.

The United States Marshal is further authorized to take the said detained into his custody for the purpose of effecting his release upon bail as hereinbefore stated.

Done in open court this 23d day of October, 1918.

M. T. DOLING,
United States District Judge. [13]

In the District Court of the United States, in and for the Northern District of California, First Division, Southern Division.

In the Matter of LIM CHAN (16742/4–12 ex SS. "NIPPON MARU," December 8, 1917).

Motion for Release on Bail.

Comes now the detained herein, by his counsel George A. McGowan, Esquire, and moves that the said detained be released on bail during the future and further proceedings to be had herein upon the following grounds:

This petition for a writ of habeas corpus now pending before the Court is not an application in the *first instance* for the petitioner to enter the United States, he having presented his application in the *first instance* to the Commissioner of Immigration for the port and district of San Francisco, who denied the same, and the said petitioner presented his application in the *second instance* to the Secretary of Labor upon the appeal from the excluding deci-

sion of the said Commissioner of Immigration, which said appeal was dismissed, and that the application for a writ of habeas corpus herein is therefore an application in the *third instance* upon behalf of this petitioner to enter the United States.

That there is at the present time an epidemic of Spanish influenza prevalent in the community, and at the Immigration Station at Angel Island, where the said detained is confined. That there were reported yesterday to be seventeen cases in the [14] Immigration hospital, and that such detention necessarily involves an element of exposure to contagion which one enduring such detention cannot avoid. That the Commissioner of Immigration has wired the Secretary of Labor for authority and permission to parole detained immigrants whose cases have been heard, on account of said epidemic.

That your petitioner therefore moves that the said detained be released on bail in the sum of One Thousand Dollars ($1,000.00) during the future and further proceedings to be had herein.

Dated, San Francisco, California, October 23d, 1918.

GEO. A. McGOWAN,
Attorney for Petitioner.

[Endorsed]: Filed Oct. 23, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [15]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,404.

In the Matter of LIM CHAN on Habeas Corpus.

(Order Sustaining Demurrer to Petition for Writ.)

GEORGE A. McGOWAN and H. GOLDMAN, Attorneys for Petitioner.

Mrs. ANNETTE ABBOTT ADAMS, United States District Attorney, and C. F. TRAMUTOLO, Assistant United States Attorney, Attorneys for Respondent.

ON DEMURRER TO PETITION FOR WRIT OF HABEAS CORPUS.

The demurrer to the petition for a writ of habeas corpus herein is sustained and said petition is denied.

October 30, 1918.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Oct. 30, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[16]**

In the District Court of the United States, in and for the Northern District of California, Southern Division, Division No. 1.

No. 16,404.

In the Matter of LIM CHAN (16742/4–12 ex SS. "NIPPON MARU," December 8, 1917), on Habeas Corpus.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to the Hon. ANNETTE A. ADAMS, United States Attorney for the Northern District of California.

You and each of you will please take notice that Lin Chan, the detained and petitioner herein, does hereby appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from the order and judgment made and entered herein on the 30th day of October, 1918, sustaining the demurrer, and denying the petition for a writ of habeas corpus filed herein and dismissing the same.

Dated, San Francisco, California, December 21, 1918.

HEIM GOLDMAN,
GEO. A. McGOWAN,

Attorneys for Petitioner, Detained and Appellant Herein. [17]

In the District Court of the United States, in and for the Northern District of California, Southern Division, First Division.

No. 16,404.

In the Matter of LIM CHAN (16742/4–12 ex SS. "NIPPON MARU," December 8, 1917), on Habeas Corpus.

Petition for Appeal.

Comes now Lim Chan, the detained, petitioner and appellant herein, and says:

That on the 30th day of October, 1918, the above-entitled court made and entered its order and judgment herein, sustaining the demurrer and denying the petition for a writ of habeas corpus filed herein and dismissing the same, in which said order and judgment certain errors are made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herein.

WHEREFORE this appellant prays that an appeal may be granted in his behalf to the Circuit Court of Appeals of the United States for the Ninth Circuit for a correction of the errors so complained of, and further that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

It is further prayed that during the pendency of the said appeal that the said Lim Chan may retain

his liberty and remain at large under the order heretofore made herein, provided that he remain within the State of California, and render himself in [18] execution of whatever judgment is finally entered herein.

Dated San Francisco, California, December 21, 1918.

HEIM GOLDMAN,
GEO. A. McGOWAN,
Attorneys for Petitioner Detained and Appellant Herein. [19]

In the District Court of the United States, in and for the Northern District of California, Southern Division, Division No. 1.

No. 16,404.

In the Matter of LIM CHAN (16742/4–12 ex SS. "NIPPON MARU," December 8, 1917), on Habeas Corpus.

Assignment of Errors.

Comes now Lim Chan, the detained, petitioner and appellant herein, by his attorneys, Heim Goldman and George A. McGowan, Esquires, in connection with his petition for a rehearing herein, and assigns the following errors which he avers occurred upon the trial or hearing of the above-entitled cause, and upon which he will rely upon appeal to the Circuit Court of Appeals for the Ninth Circuit, to wit:

FIRST: That the Court erred in denying the petition for a writ of habeas corpus herein.

SECOND: That the Court erred in not holding that it had jurisdiction to issue a writ of habeas corpus, as prayed for in the petition herein.

THIRD: That the Court erred in not holding that the allegations contained in the petition herein for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus, as prayed for in the said petition.

FOURTH: That the Court erred in holding that the Secretary of Labor and the Commissioner of Immigration had accorded the appellant, Lim Chan, a fair hearing in the matter of the proceedings to determine his application to enter the United States as the minor son of a merchant. [20]

WHEREFORE, the appellant prays that the judgment and order of the United States District Court, in and for the Northern District of California, Southern Division, Division No. 1, made and entered herein in the office of the clerk of said court on the 30th day of October 1918, sustaining the demurrer and denying the petition for a writ of habeas corpus filed herein and dismissing the same be reversed, and that this cause be remitted to the lower court with instructions to discharge the said Lim Chan from custody, or grant him a new trial before the lower court, by directing the issuance of a writ of habeas corpus, as prayed for in the said petition.

And it is further prayed that the said Lim Chan may remain on bond in the sum of One Thousand

Dollars ($1,000) previously given herein, during the future and further proceedings to be had herein.

Dated San Francisco, California, December 21, 1918.

HEIM GOLDMAN,
GEO. A. McGOWAN,
Attorneys for Appellant.

[Endorsed]: Filed Dec. 21, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Service of the within Notice of and Petition for Appeal and Assignment of Errors and receipt of copies thereof are hereby admitted this 21st day of December, 1918.

ANNETTE ABBOTT ADAMS,
U. S. Attorney. [21]

In the District Court of the United States, in and for the Northern District of California, Southern Division, First Division.

No. 16,404.

In the Matter of LIM CHAN (16742/4–12 ex. SS. "NIPPON MARU," December 8, 1917), on Habeas Corpus.

Order Allowing Petition for Appeal.

On this 21st day of December 1918, comes Lim Chan, the detained, *petition* and appellant herein, by his attorneys, Heim Goldman and George A. McGowan Esquires, and having previously filed herein, does present to this Court his petition praying for the allowance of an appeal to the United States Cir-

cuit Court of Appeals for the Ninth Circuit, from the order and judgment made and entered herein on the 30th day of October, 1918, sustaining the demurrer and denying the petition for a writ of habeas corpus filed herein and dismissing the same, intended to be urged and prosecuted by him, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper.

IN CONSIDERATION WHEREOF, this Honorable Court does hereby allow the appeal herein prayed for, and orders and directs that the execution of the order of deportation made by the Secretary of Labor, be stayed, pending a hearing of the said [22] case in the United States Circuit Court of Appeals for the Ninth Circuit, and it is further ordered that the said Lim Chan may remain on bond in the sum of One Thousand Dollars ($1,000) previously giyen herein during the further and future proceedings to be had herein, provided that he remain within the State of California, and render himself in execution of whatever judgment is finally entered herein.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Service of the within order and receipt of a copy thereof is hereby admitted this 21st day of December, 1918.

ANNETTE ABBOTT ADAMS,
U. S. Atty.

Filed Dec. 21, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [23]

In the District Court of the United States in and for the Northern District of California, Southern Division, First Division.

No. 16,404.

In the Matter of LIM CHAN (16742/4–12 ex. SS. "NIPPON MARU," December 8, 1917), on Habeas Corpus.

Stipulation and Order Respecting Withdrawal of Immigration Record.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the petitioner and appellant herein, and the attorneys for the respondent and appellee herein, that the original immigration record in evidence and considered as part and parcel of the petition for a writ of habeas corpus upon hearing of the demurrer in the above-entitled matter, may be withdrawn from the files of the clerk of the above-entitled court, and filed with the clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit, there to be considered as part and parcel of the record on appeal in the above-

entitled case with the same force and effect as if embodied in the transcript of the record and so certified to by the clerk of this Court.

Dated San Francisco, California, April 18th, 1919.

HEIM GOLDMAN,
GEO. A. McGOWAN,
Attorneys for Petitioner and Appellant.
ANNETTE ABBOTT ADAMS,
United States Attorney for the Northern District of California,
Attorney for Respondent and Appellee. [24]

ORDER.

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said immigration record therein referred to may be withdrawn from the office of the clerk of this court, and filed in the office of the clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit, said withdrawal to be made at the time the record on appeal herein is certified to by the clerk of this court.

WM. H. HUNT,
United States Circuit Judge.

Dated San Francisco, California, April 18th, 1919.

[Endorsed]: Filed Apr. 18, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [25]

Certificate of Clerk U. S. District Court to Transcript on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of

California, do hereby certify that the foregoing 25 pages, numbered from 1 to 25, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the Matter of Lim Chan on Habeas Corpus, No. 16,404, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal (copy of which is embodied in this transcript) and the instructions of the attorney for petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Six Dollars and Ninety-five Cents ($6.95), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal, issued herein (page 27).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of August, A. D. 1919.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [26]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco, and to His Attorney, ANNETTE A. ADAMS, U. S. Attorney for the Northern District of California, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the Southern Division of the United States District Court for the Northern District of California, First Division, wherein Lim Chan is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable W. H. HUNT, United States Circuit Judge for the Northern District of California, U. S. Circuit Court of Appeals, 9th Circuit, this 18th day of April, A. D. 1919.

W. H. HUNT,

United States Circuit Judge. [27]

[Endorsed]: No. 16,404. United States District Court for the Northern District of California, Southern Division, First Division. In re Lim Chan, on Habeas Corpus, Appellant, vs. Edward White, as Commissioner of Immigration for the Port of

San Francisco. Citation on Appeal. Filed Apr. 18, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Service of the within citation on appeal and receipt of a copy thereof is hereby admitted this 18th day of April, 1919.

ANNETTE ABBOTT ADAMS,
B. F. G.,
United States Attorney.

This is to certify that a copy of the within citation on appeal has been this day lodged with me as the clerk of the United States District Court in and for the Northern District of California.

Dated San Francisco, Cal., April 18th, 1919.

W. B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk.

[Endorsed]: No. 3377. United States Circuit Court of Appeals for the Ninth Circuit. Lim Chan, Appellant, vs. Edward White, as Commissioner of Immigration for the Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed August 13, 1919.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

No. 16,404.

In the Matter of LIM CHAN, on Habeas Corpus (16742/4–12 ex SS. "NIPPON MARU," December 8, 1917).

Order Extending Time to Docket Case.

Good cause appearing therefor, and upon motion of George A. McGowan, Esquire, attorney for the petitioner and appellant herein,—

IT IS HEREBY ORDERED that the time within which the record in the above-entitled case may be docketed in the office of the clerk of the Circuit Court of Appeals for the Ninth Circuit may be, and the same hereby is extended for the period of thirty (30) days from and after the date hereof.

Dated San Francisco, California, June 14, 1919.

W. H. HUNT,
United States Circuit Judge.

Service of the within order and receipt of a copy thereof is hereby admitted this 14th day of July, 1919.

ANNETTE ABBOTT ADAMS,
U. S. Atty.

[Endorsed]: No. 16,404. In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division. In the Matter of Lim Chan, on Habeas Corpus (16742/4–12 ex SS. "Nippon Maru," De-

cember 8, 1917). Order Extending Time to Docket Case.

No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Aug. 14, 1919, to File Record Thereof and to Docket Case. Filed Jul. 14, 1919. F. D. Monckton, Clerk.

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

No. 16,404.

In the Matter of LIM CHAN, on Habeas Corpus (16742/4–12 ex SS. "NIPPON MARU," December 8, 1917).

Order Extending Time to Docket Case.

Good cause appearing therefor, and upon motion of George A. McGowan, Esquire, attorney for the petitioner and appellant herein,—

IT IS HEREBY ORDERED that the time within which the record in the above-entitled case may be docketed in the office of the clerk of the Circuit Court of Appeals for the Ninth Circuit may be, and the same hereby is extended for the period of thirty (30) days from and after the date hereof.

Dated San Francisco, California, July 14th, 1919.

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: No. 16,404. In the Southern Division of the District Court of the United States, in

and for the Northern District of California, First Division. In the Matter of Lim Chan, on Habeas Corpus (16742/4–12 ex SS. "Nippon Maru," December 8, 1917). Order Extending Time to Docket Case.

Service of the within order and receipt of a copy thereof is hereby admitted this 14th of June, 1919.

ANNETTE ABBOTT ADAMS,
G.
U. S. Atty.

No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to July 14, 1919, to File Record Thereof and to Docket Case. Filed Jun. 14, 1919. F. D. Monckton, Clerk.

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

No. 16,404.

In the Matter of LIM CHAN, on Habeas Corpus (16742/4–12 ex SS. "NIPPON MARU," December 8, 1917).

Order Extending Time to Docket Case.

Good cause appearing therefor, and upon motion of George A. McGowan, Esquire, attorney for the petitioner and appellant herein,—

IT IS HEREBY ORDERED that the time within which the record in the above-entitled case may be docketed in the office of the clerk of the Circuit Court of Appeals for the Ninth Circuit may be, and the

same hereby is extended for the period of thirty (30) days from and after the date hereof.

Dated San Francisco, California, May 16, 1919.

W. H. HUNT,
United States District Judge.

[Endorsed]: No. 16,404. In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division. In the Matter of Lim Chan, on Habeas Corpus (16742/4–12 ex SS. "Nippon Maru," December 8, 1917). Order Extending Time to Docket Case.

Service of the within order extending time to docket case, and receipt of a copy thereof is hereby admitted this 16th day of May, 1919.

ANNETTE ABBOTT ADAMS,
United States Attorney for the Northern District of California.

No. 3377. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Aug. 14, 1919, to File Record Thereof and to Docket Case. Filed May 10, 1919. F. D. Monckton, Clerk. Re-filed Aug. 13, 1919. F. D. Monckton, Clerk.

No. 3377

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Lim Chan,

Appellant,

vs.

Edward White, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

BRIEF FOR APPELLANT.

Geo. A. McGowan,
Heim Goldman,
Attorneys for Appellant.

Filed
OCT 31 1919
F. D. Monckton,
Clerk

Pernau-Walsh Printing Co.

No. 3377

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LIM CHAN,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from an order of the Southern Division of the United States District Court for the Northern District of California, First Division thereof, denying the petition for a writ of *habeas corpus,* and ordering the remand of the detained, Lim Chan, the appellant herein, into the custody of the appellee for the purpose of returning him to China.

This appellant applies to enter the United States as the minor son of a resident Chinese merchant lawfully domiciled therein. The minority of the

appellant is conceded, as also is the fact that the father is a merchant lawfully domiciled within this country, together with the further fact that there are no prohibitive features attached to the father's business. The sole issue raised by the appellee as the Commissioner of Immigration, is that of relationship, that is to say, whether this appellant is the son of the person whom he claims as his father, and who in turn claims him as his son.

Appellant contends that the evidence submitted upon his behalf was of such a positive nature and conclusive character establishing the existence of the disputed relationship, that in refusing to be guided thereby and in finding adversely thereto, the Commissioner of Immigration abused the discretion vested by law in the governmental officer or officers whose duty it was to have decided and determined said case. Upon appeal to the Secretary of Labor the excluding decision was affirmed and said action is also contended to be in abuse of the discretion conferred by statute. The appellant contends that the discrimination mentioned was indulged in solely because the principals were persons of the Chinese race. That they were treated in a prejudicial manner and their case determined in a manner contrary to the favored nation clause contained in the treaty with China which assures to them all of the rights, privileges, immunities and exemptions which are accorded the subjects of the most favored nation. Solely because appellant was an alien Chinese person, his case was determined by

the Commissioner of Immigration, whereas all aliens other than Chinese have the right to have their cases determined by a Board of Special Inquiry consisting of three Immigration Inspectors wherein he would have had an enlarged opportunity to present his case and have it properly determined.

Argument.

The following two points are involved in this case:

First: Whether an alien Chinese is entitled as of right, by statute, or the favored nation clause of the treaty, upon applying for admission to the United States, to have his case, when doubt is entertained as to his admissibility, determined by a Board of Special Inquiry as provided by statute.

Second: Whether there was an abuse of discretion in disregarding the positive and conclusive character of the evidence presented establishing the existence of the relationship as claimed by appellant.

First.

WHETHER AN ALIEN CHINESE IS ENTITLED AS OF RIGHT, BY STATUTE, OR BY THE FAVORED NATION CLAUSE OF THE TREATY, UPON APPLYING FOR ADMISSION TO THE UNITED STATES, TO HAVE HIS CASE, WHEN DOUBT IS ENTERTAINED AS TO HIS ADMISSIBILITY, DETERMINED BY A BOARD OF SPECIAL INQUIRY AS PROVIDED BY STATUTE.

This point as applicable to a person of the Chinese race who claims American citizenship, was presented to this court and upheld in the recent cases of Quan Hing Sun v. White, 254 Fed. 402, and Jeong Quey How v. White, 258 Fed. 618. Since the rendition of the earlier of the two decisions the Commissioner General of Immigration with the approval of the Secretary of Labor, has amended the rules and regulations as applicable to all Chinese persons applying for entry into the United States, so that when doubt is entertained as to the admissibility of any Chinese person, irrespectively whether his claim of admission is based upon citizenship or as an alien member of the exempt classes, his claim is to be primarily determined by a Board of Special Inquiry. What appellant asks in this regard is what is now accorded under the existing practice to all alien Chinese applying for entry into the United States. At the time of his application to enter it was a right withheld while now it is a right accorded.

The favored nation clause of the treaty with China is as follows:

"Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

Article II, Treaty between the United States and China, concerning Immigration. (22 Stat. L. 826).

The Congress of the United States by its Act of June 6, 1900 (31 Stat. L. 588-611), in making appropriations for sundry civil expenses and for other purposes, placed the Commissioner-General of Immigration in charge of the administration of the Chinese-exclusion law and of the various acts regulating immigration, under the supervision and direction of the Secretary of the Treasury. By the Act of February 14, 1903 (32 Stat. L. 825), the Department of Commerce and Labor was created and the Commissioner-General of Immigration, the Bureau of Immigration, and the Immigration Service was transferred from the Treasury Department to the newly created Department; and by the Act of March 4, 1913 from that Department to the newly created Department of Labor. By the General Immigration Laws the Commissioners of Immigration for the various ports of admission, have executive powers only, the Immigration Inspectors. in the first instance, and three of them collectively

when convened as a Board of Special Inquiry after an applicant for admission is held, have the power to determine the admissibility or non-admissibility of all aliens. In the event of a denial or a difference of opinion a right of appeal exists to the Secretary of the Department. The Commissioners of Immigration at the various ports of entry are excluded entirely from determining the admissibility or non-admissibility of applicants for admission. So this appellant contends that as an alien he was as of right, under the treaty and the statutes mentioned above, entitled to have his case determined before a Board of Special Inquiry, a right accorded to all other aliens, and as the treaty secures to him equal rights, privileges, immunities and exemptions, with the subjects of the most favored nations, this it seems is his due.

The conclusion contended for seems to be that reached by the Secretary of Labor and the Commissioner-General of Immigration for since the 4th and 5th of last March, following the decision of this court in the case of Quan Hing Sun v. White. *supra,* the former existing regulations were amended to accord to all Chinese applicants for admission, irrespective of the ground of the application, that is whether citizenship or as a member of the exempt classes of alien Chinese entitled to admission under the treaty and the statute, a hearing before a Board of Special Inquiry, when any question was raised as to their right of entry. What this appellant asks for his protection from this court is what

the respondent has ever since the 4th and 5th days of March of the present year, accorded to alien Chinese applicants for admission. He contends that he is entitled to have his case determined in the same manner and by the same procedure as any other alien person. That the Chinese persons come under the provisions of the Immigration Law is a settled question.

24 Op. Atty. Gen. 706;
In re Lee Sher Wing, 164 Fed. 506;
Looe Shee v. North, 170 Fed. 566;
U. S. v. Wong You, 223 U. S. 67;
Low Wah Suey v. Backus, 225 U. S. 673.

These decisions were all rendered under the earlier Immigration Laws. The last and present General Immigration Law is much more conclusive upon this point than any of the earlier laws. Section 1 defines the word "alien" with remarkable clarity. Sections 16 and 17 covers the procedure to be followed by the government officers when a person *applies to enter* this country. Note the first part of Section 17:

> "That boards of special inquiry shall be appointed by the commissioner of immigration or inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law."

The universality of expression *"the law"* is meant to embrace the entire body of the law and is not limited to *"this law"*. Note further the pro-

visions of Section 19 covering *deportation* procedure, the second clause being as follows:

> "any alien who shall have entered or who shall be found in the United States in violation of this act, or in violation of any other law of the United States;"

thus showing a common purpose as affecting admission and deportation cases.

It is true that Section 38 provides:

> "That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, except as provided in section nineteen hereof,"

and makes no mention of Sections 16 and 17 but it is contended that such a reference is unnecessary, and had mention been made of them it would have been surplusage pure and simple. Part of the laws so held in force relating to the admission of Chinese was the said earlier act of June 6, 1900 placing the administration of these laws and of the various acts regulating immigration in charge of the Commissioner-General of Immigration, under the supervision and direction of the Secretary.

Second.

WHETHER THERE WAS AN ABUSE OF DISCRETION IN DISREGARDING THE POSITIVE AND CONCLUSIVE CHARACTER OF THE EVIDENCE PRESENTED ESTABLISHING THE EXISTENCE OF THE RELATIONSHIP AS CLAIMED BY APPELLANT.

Upon this point the courts have repeatedly held that discretion may be abused by disregarding and

finding adversely to a positive and conclusive showing. In other words that the discretion committed to the Immigration authorities is a *legal* discretion and not an *arbitrary* one. Cases illustrative of this point are

Low Wah Suey v. Backus, 225 U. S. 673;
Tang Tun v. Edsell, 223 U. S. 673;
Ong Chew Lung v. Burnett, 232 Fed. 853;
Chan Kam v. United States, 232 Fed. 855;
Ex parte Chin Loy You, 223 Fed. 833;
Ex parte Wong Foo, 230 Fed. 534;
Ex parte Leong Wah Jam, 230 Fed. 534;
Ex parte Ng Doo Wong, 230 Fed. 751;
Ex parte Lee Dung Moo, 230 Fed. 746;
Ex parte Tom Toy Tin, 230 Fed. 747;
Chin Fong v. White, 258 Fed. 849;
Ex parte Long Lock, 173 Fed. 208;
Ex parte Lee Kow, 161 Fed. 592;
U. S. v. Chin Len, 187 Fed. 544.

In this case there are certain fundamental facts that stand forth and can neither be denied or gainsaid. The father of this appellant is admitted and conceded to be a merchant in the full meaning of that term as the same is used in the Chinese Exclusion Laws and that fact has been established by the class and kind of testimony exacted by the Act; that is, the testimony of two credible witnesses other than Chinese. The store has been examined, the books of the firm inspected, and all else according to the full desires of the immigration authorities. As to the other points relied upon it is to be observed that

the father is a man of suitable and sufficient years to be the father of the appellant, that he was in China at a time which would have enabled the paternity to be possible, that upon his return to the United States he mentioned his wife and children and testified about them as fully as the then immigration authorities thought advisable, and when the applicant was compared with his father by the examining inspector he noted a physical resemblance between them. He further certified in his abstract of record and report that none of the witnesses were disqualified according to the records of their office and that their demeanor while under examination was good. He further certifies that the applicant is a minor and about the age claimed. That the testimony is preponderant in favor of the existence of the relationship cannot be disputed. The authorities have sought to discredit it by calling attention to certain variances between the testimony of the witnesses. These are not matters of importance nor are they of a character to impeach the credibility or standing of the witnesses. The fact that the father, who has lived here in recent years did not know of the marriage of one of his daughters in China during his absence, need occasion no wonder. Chinese women do not write and the mail facilities in the interior of China are crude and primitive almost beyond belief. It is of record in the father's testimony that he received about three letters a year from his family, consisting of his wife and two sons and two daughters. The status of women in

China is not what it is with us. Quoting from a most estimable work "Things Chinese" by J. Dyer Ball (Fourth Edition, Revised and Enlarged) pages 762 and 763 under the caption "Woman, the status of" the following appears:

> "Woman, in China, occupies a totally different sphere from that of a man; a sphere which, though it must of necessity touch that of man at certain points, should be kept as separate as possible. At the early age of seven, according to the practice of the ancients, 'boys and girls did not occupy the same mat nor eat together'; and this is still carried to such an extent that a woman's clothes should not hang on the same peg as a man's, nor should she use the same place to bathe in. The finical nonsense that all this engenders is sometimes absurd; it is not even proper for a woman to eat with her husband." * * *
>
> "Woman is made to serve in China, and the bondage is often a long and bitter one; a life of servitude to her parents; a life of submission to her parents-in-law at marriage;" * * * "All these restrictive customs are based on the idea that woman occupies a lower plane than man; he is the superior, she the inferior; as heaven is to earth, so is man to woman." * * * "Does her husband have friends at his house? She is invisible, a nameless thing, for it would be an insult for a visitor to enquire after his host's wife."
>
> "Of so little account is woman in China, that a father, if asked the number of his children, will probably leave out the girls in reckoning; or, if he has no boys, his reply will be 'only one girl', said in such a tone of voice, as to call forth the sympathy of his listener for his unfortunate position."

After reading the above could there be any just or reasonable criticism for a variance between the testimony of the appellant and his father as whether the women in the houses adjoining his had bound or natural feet. Where an examination refers to the immediate family, uniformity in this regard would be expected, but, when referring to the women neighbors it is an entirely different matter.

There is a further discrepancy having to do with an accident which the father testified as having sustained when in Hongkong, of spraining his knee. The father is possibly exaggerating his condition on the one hand and the applicant not regarding the matter as at all serious, professes not to remember it. This is not unusual when we consider the alienage of these people and the fact that they have to submit themselves to a very rigid health examination. It is probable that the appellant all the voyage over from China, had the dread in his mind of the physical examination which he and all of the other passengers would have to undergo upon arrival. He knew that his father must have had the same dread in his mind upon his return to this country the preceding year, and hence concluded that this accident would have been the last thing in the world that his father would have testified about, and so he probably concluded to make no mention of it. The point that we desire to make with respect to these matters of discrepancy is that they were the determinating factors which caused the examining inspector to discredit the case. By referring

to his Abstract of Record and Report we find the following:

> "Do you believe relationship as alleged exists? No.
>
> If not, is your adverse opinion based upon the discrepancies in testimony? Yes.
>
> If your opinion is adverse to relationship claims made, would it be otherwise if you disregarded the discrepancies in testimony? Yes."

From the above we see clearly that these discrepancies were the determinating factor in the examining inspector's mind, and that if they can or may properly be laid out of the case, that then and in that event, his opinion would be in favor of the existence of the relationship. None of these matters bear at all upon the question of relationship which is the only question in dispute and hence they should, it is submitted, be laid out of the case. Upon this point attention is directed to a recent opinion of Judge Dooling in the case of Lum You on Habeas Corpus, No. 16,617, in the records of the lower court wherein on September 16, 1919, it was held as follows:

> "The record shows that petitioner was admitted to this country in January, 1910, as the son of a native born citizen of this country. He was then about 12 years old. In 1916 he returned to China without a pre-investigation of his status, because the serious illness of his mother in China whom he desired to see, did not afford him time for such pre-investigation. Returning in March, 1919, he was denied admission because of certain discrepancies between his testimony and that of his alleged father and

because of other discrepancies in the testimony of the father given at different times in regard to the conditions in the home village. None of these latter seem to bear at all upon the question of relationship, which is the only question in dispute.

The rights of one whose status as an American Citizen has already been determined, who has lived a number of years in this Country without question, should be, it seems to me, more stable than to be overturned by the evidence in the present case, much of it having nothing at all to do with the question at issue. I do not mean that a first, or second, or third adjudication of status by the Department is final, or that it may not later be set aside, but I do mean that there should be some substantial reason for so doing. To my mind such does not appear in the present case."

The position of this appellant with respect to the evidence of this case is that the examining inspector who alone came in contact with the witnesses under examination states as follows:

"What was demeanor of all witnesses during examination? O. K.

Are any of them substantially discredited before this office? Not to my knowledge."

and also as follows:

"Is there resemblance between alleged father and applicant? Expression of eyes somewhat similar."

He was satisfied with the existence of the relationship if the discrepancies were disregarded. We are therefor in a position to state that by the elimination of the discrepancies, the finding from the

evidence by the examining inspector was in favor of the existence of the relationship. These discrepancies are on a par with those mentioned in Lum You, *supra,* as not bearing at all upon the question of relationship, which is the only question in dispute, and that the inspectors otherwise favorable finding on the issue of relationship should be more stable than to be overturned by the discrepancies in the present case much of which has nothing to do at all with the question at issue, namely, relationship.

Where the reason for the denial may be laid out of the case and eliminated from further consideration, and where what remains is entirely in favor of the ground for admission and sufficient to sustain it, and admittedly such is the case here for the examining inspector has reported that his opinion is in favor of the *bona fides* of the case, if he disregarded the discrepancies, then the court may proceed to final judgment. That was the holding of this court in the case of Chin Fong v. White, 258 Fed. 849. This court would not be called upon to weigh the evidence, that being the province of the inspector, but in the case at bar, the court is but asked to accept the determination of the inspector. who has himself appraised or weighed the testimony and the evidence, in the event that the discrepancies are laid out of the case, by his report that in that contingency his opinion and conclusion would be in favor of the case. One cannot read the record in this case without being impressed with the belief that there has been discrimination, racial

discrimination, indulged in. Under the section of the treaty quoted herein, this exempt merchant would be entitled to bring into this country his *"body and household servants"* so why would he misrepresent this applicant as his son? There would be no reason for it.

In finally submitting this matter we do so firm in the belief and conviction that there has been discrimination indulged in against these witnesses and this appellant solely because they were all of the Chinese race, and this in spite of the treaty guarantee mentioned above. They have not, we most respectfully submit, been accorded the same mutuality of hearing and consideration of their case, as are guaranteed them by the treaty obligations, nor directed by the various statutes mentioned. In view of the foregoing it is most respectfully urged that the judgment of the lower court be reversed, with instructions to issue the writ of *habeas corpus* as prayed for, to the end that the appellant may be discharged from custody and that he may go hence without day.

Dated, San Francisco,
October 27, 1919.

Respectfully submitted,
Geo. A. McGowan,
Heim Goldman,
Attorneys for Appellant.

NO. 3377

IN THE

United States Circuit Court of Appeals

for the Ninth Circuit.

LIM CHAN,

Appellant,

vs.

EDWARD WHITE, Commissioner of Immigration,

Appellee.

APPELLEE'S REPLY BRIEF.

ANNETTE ABBOTT ADAMS,
United States Attorney,

BEN F. GEIS,
Assistant United States Attorney,

Attorneys for Appellee.

FILED
NOV 29 1919

NO. 3377

In the United States Circuit Court of Appeals For the Ninth Circuit

LIM CHAN, *Appellant,* vs. EDWARD WHITE, Commissioner of Immigration, *Appellee.*	

APPELLEE'S REPLY BRIEF.

Appellant, Lim Chan, arrived at the Port of San Francisco on the S. S. "Nippon Maru," December 8, 1917, and made application to the Commissioner of Immigration for said Port for admission into the United States, claiming to be the minor son of a lawfully domiciled Chinese merchant, Lim Kee.

In support of said application, appellant filed affidavits of his alleged father, Lim Kee, two white witnesses, M. J. Lynch and B. Frankenberg, and

an identifying witness, Lim Yin Haun, (Ex. "A," pp. 3-2-1). All witnesses appearing on behalf of appellant were examined by an Immigrant Inspector, their testimony taken in shorthand, and transcribed in typewriting, and same made a part of Government Exhibit "A."

The examining inspector, after pointing out the discrepancies in the testimony, (Ex. pp. 45 to 42) recommended that

> "In view of the foregoing, I am of the opinion that the relationship as claimed, does not exist and denial is therefore recommended."

Thereafter the Commissioner of Immigration, after a careful consideration of all the evidence, found that

> "I am unable to conclude that the applicant is entitled to admission, the relationship claimed to his alleged father not having been established to my satisfaction." (Ex. "A," p. 46).

The Consul General for China, and attorneys for appellant, were thereafter notified in writing of said Commissioner's decision, and allowed 10 days within which to submit additional evidence. (Ex. "A," pp. 48-47).

Appellant's attorneys were thereafter allowed to review the entire record in the case as shown by their receipt therefor. (Ex. "A," p. 50). No additional evidence being offered, the application of appellant to enter the United States was denied by the said Commissioner on the 5th day of February, 1918, on the grounds that

> "The relationship claimed to his alleged father is not established to my satisfaction." (Ex. "A," p. 52).

Thereafter appellant, the Consul General for China and the attorneys of record were so advised in writing and allowed 5 days within which to take an appeal to the Secretary of Labor. (Ex. "A," pp. 55-A, 55, 54 and 53).

Notice of appeal to said Secretary was filed February 7, 1918, (Ex. "A," p. 56), and the case forwarded to Washington for his review and decision. Appellant was represented before the said Secretary in Washington by Attorneys Ralston and Richardson of that city, (Ex. "A," p. 59), who filed a brief on appellant's behalf. (Ex. "A," p. 66).

After a careful consideration of all the evidence in the case and an oral argument before the Secre-

tary by said Washington attorneys, the said Secretary of Labor affirmed the excluding decision of the said Commissioner and ordered appellant's deportation. (Ex. "A," pp. 63 to 60, and 68 to 67).

Thereafter, to-wit, July 2, 1918, a petition for writ of habeas corpus (Tr. p. 2) and order to show cause, (Tr. p. 11) was filed in the District Court, Northern District of California, Division No. 1, to which a demurrer was filed. (Tr. p. 12).

Thereafter, to-wit, October 30, 1918, the said demurrer was sustained and the petition for writ of habeas corpus denied. (Tr. p. 17).

It is from said order sustaining the demurrer and denying said petition that the appeal in this case is taken.

Appellant's minority is conceded on the record as is also the mercantile status of the alleged father, Lim Kee.

Appellant was denied admission and ordered deported solely on the grounds that the relationship to his alleged father had not been satisfactorily established, the burden of proof under the law being upon appellant to establish said fact.

ARGUMENT.

In his assignment of errors, (Tr. p. 21) counsel for appellant assigns four errors on which he asks that the judgment of the lower court in this case be reversed. However, in his brief, he urges but two points, the first of which does not appear in his assignment of errors.

On Page 3 of his brief, counsel opens his argument in the following language:

> "The following two points are involved in this case:
>
> > First. Whether an alien Chinese is entitled as of right, by statute, or the favored nation clause of the treaty, upon applying for admission to the United States, to have his case, when doubt is entertained as to his admissibility, determined by a Board of Special Inquiry as provided by Statute.
> >
> > Second. Whether there was an abuse of discretion in disregarding the positive and conclusive character of the evidence presented establishing the existence of the relationship as claimed by appellant."

It will be noted that the first point raised and argued at some length, (Pages 4 to 8 of appellant's brief) is here raised for the first time. It was not raised before the Commissioner of Immigration or before the Secretary of Labor when the matter was pending before them. No such claim was made in

the petition for the writ of habeas corpus, nor in the Court below nor in the appeal to this Court. Under Rule 11 of this Court, errors not assigned according to this rule will be disregarded, but the Court, at its option, may notice a plain error not assigned. Surely, this cannot be regarded as a plain error not assigned, appearing as it does for the first time in appellant's brief and nowhere else in the entire record of the case.

This same point was passed upon by this Court, adversely to appellant, in the case of Jeung Bock Hong and Jeung Bock Ning, 258 Fed. 23. In this case the Court, speaking through his Honor, Judge Morrow, says:

> "In this case no such claim was made in the petition for the writ of habeas corpus and no such claim was made in the Court below or in the appeal to this Court. It was made for the first time in the Addendum to Counsel's brief after the submission of the case in this Court. In the absence of a record presenting the proceedings referred to, it cannot be considered on appeal."

Since the decision of this Court in the case of Quan Hing Sun, et al, vs. Edward White, No. 3039, and in deference thereto, the Secretary of Labor, in order to remove any appearance of unfairness or discrimination in the examination of

Chinese applicants, has directed that the rights of all such arriving applicants to enter the United States be determined by a Board of Special Inquiry.

It will be noted, however, that in the case at bar appellant arrived in this Port in December, 1917, long before the decision in the Quan Hing Sun case was rendered, and the procedure followed at that time was followed in the case at bar, and is the same procedure followed in all similar cases arising under the Chinese Exclusion Laws for the past 37 years.

ABUSE OF DISCRETION.

As stated by counsel in his opening brief, the minority of appellant and the mercantile status of his alleged father is conceded on the record.

Appellant was denied admission by both the Commissioner of Immigration and the Secretary of Labor, solely for the reason that the relationship of father and son had not been established to their satisfaction, and said denial and deportation was based on discrepancies in the testimony of the various witnesses appearing in the record of the case before the Immigration officials, and not on any secret or outside information, not made a part of said record.

DISCREPANCIES.

FIRST. Discrepancy as to the number of children in the family.

Testimony of alleged father, Lim Kee, Jan. 7, 1918:

Q. How many children have you?

A. Two boys and two girls living, and *three dead.*

Q. Give their names, ages, birthdays and whereabouts.

A. Lim Chun (Chan) the applicant, 20 years old, born K. S. 24-3-4. I don't know whether first or second or third month. (Mar. 25, 1898, or April 14, 1898). Lum Loy, 15 years old, born K . S. 29, first fifth month, 4th day, (May 30, 1903), at home in China. Lum Gum is the oldest girl, 23 years old, born K. S. 21-1-2 (Jan. 27, 1895). *She is at home unmarried.* Lum Jee, 22 years old, born K. S. 22-8-3 (Sept. 9, 1896) at home in China, unmarried.

Q. What are the

Testimony of appellant, Lum Chum, Jan. 7, 1918:

Q. How many living brothers and sisters have you?

A. I have one brother and two sisters.

Q. Give their names, ages and birth dates.

A. The two sisters are the oldest children, and their names are Lum Gum, 23 years old, born K. S. 21-1-2, (Jan. 27, 1895). Lum Gee, 22 years old, born K. S. 22-8-3, (Sept. 9, 1896). Brother, Lum Loy, 15 years old, born K. S. 29-5-5.

Q. Was he born first or second fifth month?

A. First fifth month (May 30, 1903). (Ex. "A," p. 24).

Q. *Have you ever had any brothers or sisters who have died?*

names of the three children who are dead?

A. Lum Woey, a girl, died K. S. 16, (1890). Lum Suey, a girl, died K. S. 18, (1892). Lum Jew, a boy, died K. S. 19, (1893).

Q. How old were these children when they died?

A. They were all one or two years of age. (Ex. "A," pp. 34 and 33).

Q. Your alleged son, Lim Chan, arrived here Aug. 7, 1916, on the S. S. "Persia Maru" and was deported on account of having trachoma.

A. Yes.

Q. You, yourself, made a statement at that time, did you not?

A. Yes.

Q. Do you wish to make any changes in the statement you made then?

A. No.

Q. At that time you stated you had two sons and two daughters, and never had any children who had died. Now you state you have three children who have

A. No.

Q. You do not agree with your father.

A. I only know that I have a brother and two sisters. I don't know of any others.

Q. Then your mother never told you that you had brothers and sisters who died.

A. No. (Ex. "A," p. 23).

died. How do you account for that?

A. They didn't ask me whether I had any children who had died. I gave them the names of my little children as I was proceeding to do today. (Ex. "A," p. 31).

Although it is claimed by the alleged father that the deceased children mentioned by him died before appellant's birth, it is improbable and inconceivable that appellant, if he is a son as claimed, should not at some time or another, have heard their names and the fact of their births and deaths mentioned by some member of the immediate family or someone familiar with the facts.

SECOND. Discrepancy as to whether or not the oldest daughter and sister are married.

Testimony of alleged father, Lim Kee:

Q. In answer to the question 'how many children have you,' after naming two sons, said Lum Gum is the oldest girl, 23 years old, born K. S. 21-1-2, (Jan. 27, 1895). *She is at home unmarried.* Lum Gee, 22 years old, born K. S. 22-8-3, (Sept. 9, 1896), at

Testimony of Lum Chum, appellant:

Q. Are either of your sisters married?

A. Lum Gum was married. Lum Gee is single.

Q. When was Lum Gum married?

A. She was married in the 8th month of C. R. 5, (Sept., 1916).

home in China, unmarried. (Ex. "A," p 33).

Q. Was your daughter, Lum Gum, engaged to be married when you last left China?

A. No.

Q. She is of marriageable age. Have you any idea when she will be married?

A. I haven't any idea. She is a free girl. She is at liberty to determine that for herself.

Q. How frequently have you received letters from home?

A. Three times or more a year.

Q. What was the name of her husband?

A. Ng Sing.

Q. Where does she live?

A. They live at Moon Low S. W. D.

Q. Has she any children?

A. No. (Ex. "A," p. 24).

The record shows, (Ex. "A," p. 34) that the alleged father, Lim Kee, went to China, C. R. 3-9-6, (Oct. 24, 1914) and returned C. R. 5-6, (July 1916). Lim Chan testifies that the oldest sister and daughter was married in C. R. 5, (Sept., 1916), or about two months after the alleged father's return. Although he received three or more letters a year from home, the alleged father claims not to have heard of said marriage. It is beyond belief that such an important event as the marriage of the oldest daughter of the family could have taken

place without the father being informed of that fact.

THIRD. Discrepancies as to whether or not Lum Bow's and Lum Sing's wives have natural or bound feet.

Testimony of alleged father, Lim Kee:

Q. How many entrances to your house?

A. Two, one on each side.

Q. Which row does your large door face?

A. On the left hand side, faces the sixth row.

Q. Who lives directly opposite your large door? The second house of the sixth row?

A. Lum Bow.

Q. Is he married?

A. Yes.

Q. *What kind of feet has his wife?*

A. Bound feet.

Q. Any children?

A. No. (Ex. "A," p. 30).

Testimony of appellant, Lum Chum:

Q. How many entrances to your house?

A. Two.

Q. Does your large door face the fourth row or the sixth row?

A. It faces the fourth row.

Q. Who lives directly opposite your small door — directly opposite the sixth row?

A. Lum Sing.

Q. Is he married?

A. Yes.

Q. *What kind of feet has his wife?*

A. *Natural.*

Q. Any children?

A. No.

Q. Were the feet of

Q. Who lives in the second house, fourth row, opposite your small door?

A. Lum Sing?

Q. Is he married?

A. Yes.

Q. *What kind of feet has his wife?*

A. *Bound feet.*

Q. Were they bound when you last left China?

A. I don't know whether they were unbound or not at the time of my visit to China. Originally, they were bound. (Ex. "A," p. 19).

Lum Sing's wife ever bound?

A. Not that I know of.

Q. Who lives opposite your large door — second house of the fourth row?

A. I wish to state that the big doors on my house face the sixth row instead of the fourth row. I just got mixed up.

Q. Who lives in the second house of the fourth row opposite your small door?

A. Lum Bow.

Q. Is he married?

A. Yes.

Q. *What kind of feet has his wife?*

A. *Natural feet.*

Q. Were they ever bound?

A. No.

Q. Any children?

A. No. (Ex. "A," p. 22).

What kind of feet has Lum Bow's wife?

Lim Kee testifies:

Q. What kind of feet has his wife?

A. *Bound feet.*

Appellant testifies:

Q. What kind of feet has his wife?

A. *Natural feet.*

Q. Were they ever bound?

A. No.

What kind of feet has Lum Sing's wife?

Lim Kee testifies:

Q. What kind of feet has his wife?

A. *Bound feet.*

Appellant testifies:

Q. What kind of feet has his wife?

A. *Natural.*

Q. Were the feet of Lum Sing's wife ever bound?

A. Not that I know of.

Here we have direct and positive contradictions in the testimony of appellant and his alleged father. The alleged father testifies positively that both women have *bound feet,* while appellant testifies just as positively that both have *natural feet.*

FOURTH. Discrepancies as to whether or not Lum Hing Kay's wife had bound feet.

Testimony of alleged father, Lim Kee:

Q. Who lives in the first house of the sixth row?

A. Lum Hing Kay.

Q. Is he married?
A. Yes.

Q. What kind of feet has his wife?
A. *Bound feet.* (Ex. "A," p. 30).

Q. Were the feet of Lum Hing, Kay's wife, bound when you last left China?

A. They were bound, not unbound. (Ex. "A," p. 19).

Testimony of appellant, Lum Chum:

Q. Who lives in the first house of the sixth row from the head?

A. Lum Hing Kay?

Q. Married?

A. Yes.

Q. What kind of feet has his wife?

A. *Natural feet.*

Q. Were her feet ever bound?

A. I don't know.

Q. Do you fully understand the difference between bound, unbound and natural feet?

A. Yes. (Ex. "A," p. 22).

Here again Lim Kee testifies that this woman has *bound feet,* while his alleged son, Lum Chun, testifies that she has *natural feet.*

FIFTH. Discrepancies as to where the only school-house in the whole village is located.

Testimony of alleged father, Lim Kee:

Q. Is there an ancestral hall in your village?

A. No, there is a school.

Q. *Where is the school?*

A. *Outside the head of the village.*

Q. *Any other house in the same row as the school-house?*

A. No.

Q. What has the applicant been doing in China?

A. Attending school.

Q. Where?

A. In the village school.

Q. Did he ever attend any other school?

A. No. (Ex. "A," p. 29).

Q. *You stated that the school-house stood*

Testimony of appellant, Lum Chun:

Q. Is there an ancestral hall in your village?

A. No.

Q. Is there a school-house?

A. Yes.

Q. Where is it?

A. *First building on the first row.*

Q. How many houses on the same row with the school-house?

A. *There are six houses altogether, including the school-house.*

Q. Any other school-house in your village?

A. No other.

Q. What have you been doing in China?

A. Attending school in the school-house I just mentioned.

Q. Did you ever at-

by itself at the head of the village. Do you count the school-house as one row or are there six rows not counting the school-house?

A. *Six rows besides the school-house.* (Ex. "A," p. 19).

tend any other school?

A. No. (Ex. "A," p. 21).

Here the alleged father testifies that the school-house stands by itself outside the head of the village, while the alleged son testifies that it is the first building in the first row, and is counted as one of the six houses in that row.

SIXTH. Discrepancy as to whether or not Lum Fook, who lives in the first house, fifth row, appellant's being second house, same row, adjoining, has any children.

Testimony of alleged father, Lim Kee:

Q. Who lives in the first house of your row?

A. Lum Fook.

Q. Is he married?

A. Yes.

Q. What kind of feet has his wife?

A. Natural feet.

Q. *Any children?*

Testimony of appellant, Lum Chun:

Q. Who lives in the first house of your row?

A. Lum Fook.

Q. Is he married?

A. Yes.

Q. What kind of feet has his wife?

A. Natural feet.

Q. *Any children?*

A. *One girl, no boys.*

Q. Name and age.

A. Lum Ng Nook, 12 or 13 years old.

Q. Is she a natural or adopted daughter?

A. His own.

Q. Was she living in that house when you were last in China?

A. Yes.

Q. Any others living in that house?

A. Not when I was in China. (Ex. "A," p. 30).

A. No.

Q. Did they ever have any children?

A. Not that I know of.

Q. Did ever any little boys or girls live in that house to your knowledge?

A. No.

Q. Did they ever have any servant girls?

A. No.

Q. Did anyone else live in that house besides Lum Fook and his wife?

A. No. (Ex. "A," p. 23.)

Here the alleged father testifies that Lum Fook with his wife and one daughter, 12 or 13 years old, lived in the house adjoining his in the fifth row, while the alleged son testifies that Lum Fook and his wife lived in that house but that they have no children and never had any to his knowledge and that there were never any children living in that house.

SEVENTH. Discrepancy as to where Lum Foon, the village school-teacher lived.

Testimony of alleged father, Lim Kee:

Q. What was the name of appellant's school-teacher?

A. Lum Wing Foon.

Q. Where does he live?

A. Third row, *second house* from the head of the village.

Q. Is he married?

A. Yes.

Q. What kind of feet has his wife?

A. Bound feet.

Q. Any children?

A. No. (Ex. "A," p. 28.)

Testimony of appellant, Lum Chun:

Q. What is the name of your school-teacher?

A. Lum Foon.

Q. Where does he live?

A. *Sixth house,* third row, counting from the right-hand side.

Q. Did he ever live in any other house?

A. No.

Q. Is he married?

A. Yes.

Q. What kind of feet has his wife?

A. Bound feet.

Q. Are they bound at the present time?

A. Bound feet at the present time.

Q. Any children?

A. No children. (Ex. "A," p. 20).

Here the alleged father, Lim Kee, testifies that Lum Foon, the village school-teacher, lives in the

second house, third row, from the head of the village, while the alleged son testifies that Lum Foon lives in the *sixth house, third row,* counting from the right-hand side.

EIGHTH. The alleged father, Lim Kee, testifies that when he and appellant went to Hongkong in April, 1916, he, Lim Kee, sprained his ankle and was unable to walk. Appellant, who it is claimed was with him, testifies that his alleged father met with no accident on that trip, but that he, appellant, hurt his foot on the second trip to Hongkong in June, 1916.

Testimony of alleged father, Lim Kee:

Q. Did you ever make any trips to Hongkong with the applicant?

A. Yes. I went with him twice.

Q. When did you make the first trip?

A. In *C. R. 5-3-4, (1916).*

Q. How long were you in Hongkong that time?

A. Until the third month, 29th day of the same year.

Testimony of appellant, Lum Chun:

Q. Did you ever make any trips to Hongkong with your father?

A. Yes, last year. (C. R. 5) 1916.

Q. How many trips to Hongkong have you made with your father?

A. Once only.

Q. When did you make that trip?

A. C. R. 5-3-4 (1916).

Q. How long were

Q. What was the object of your going to Hongkong at that time?

A. Well, there wasn't any real object. *I was delayed in coming to America on account of a sprained ankle.*

Q. Did you intend to come to the United States at that time?

A. Yes.

Q. Did you intend to bring the applicant with you?

A. Yes.

Q. Where did you sprain your ankle?

A. I sprained my ankle on board the steamer going out to Hongkong.

Q. When did you and the applicant make the next trip to Hongkong?

A. We went out again 5th month, 5th day, same year, (1916).

Q. Did you intend to bring the applicant with you at that time?

A. Yes.

you in Hongkong with him?

A. We stayed there until the 29th day of the 7th month.

Q. Why did you go to Hongkong that time?

A. To prepare for my coming to this country.

Q. Did your father intend to come to this country at that time?

A. Yes.

Q. Why didn't he come?

A. He did come.

Q. Do you mean in the third month of C. R. 5 when you and your father went to Hongkong and your father came on to this country and you returned to your home village?

A. We all returned to the village together but he left home in the 5th month of C. R. 5, (1916) for this country.

Q. Why didn't he come to this country in C. R. 5-3 (1916) when

Q. Why didn't you do so?

A. He sprained his foot in Hongkong, I think it was.

Q. Did he remain in Hongkong until you sailed or go back to the home village as soon as he sprained his foot?

A. He waited there until after I had sailed, then he went back home. (Ex. "A," p. 29).

Q. You stated that in C. R. 5-3, (1916) when you and the applicant first went to Hongkong, that you intended to come to this country but you sprained your ankle. How severely did you sprain it?

A. *Sprained it so that I could not walk.*

Q. *Did the applicant have to assist you when you moved from place to place or did you use crutches to aid you?*

A. *My son and the cook in the store where I stopped assisted me to walk, one on each side.*

Q. How long were you and he were in Hongkong?

A. He returned home because I hurt my leg.

Q. Did anyone go with you and your father when you went to Hongkong in C. R. 5-3?

A. No.

Q. Did anyone go to Hongkong in C. R. 5-5 (1916) when he left for this country?

A. Yes, I accompanied him.

Q. Why did you say just a few minutes ago that you had made but one trip to Hongkong?

A. I should have said 'two.'

Q. Did you intend to come to this country with him?

A. Yes, but I hurt my leg.

Q. Did you hurt it in C. R. 5-3 also?

A. No.

Q. Why didn't you and your father come then?

you laid up with that injury?

A. Until the 29th. I was able to go back home. It was gradually getting better. I was able to walk up to the store in Hongkong but next day it was so swollen I had to have the cook help me walk. (Ex. "A," p. 19).

A. We just changed our minds.

Q. *Did your father have any accident, hurt his arm, leg, or anything of that kind on either of these trips to Hongkong?*

A. *No.* (Ex. "A," p. 21).

Here we find another serious discrepancy which should not exist if the relationship exists as claimed. The alleged father, Lim Kee, testifies that on his first trip to Hongkong in C. R. 5-3-4, he was accompanied by his alleged son, Lim Chan, and that he, Lim Kee, sprained his ankle so severely that he was unable to walk unassisted, and that *his son,* and the cook in the store where he stopped, assisted him to walk. The alleged son, Lim Chan, testifies that his alleged father met with no accident of any kind on either of the trips it is claimed they made to Hongkong. Both agree, however, that on the second trip the alleged son sprained his foot.

NINTH. Discrepancies as to who carried the baggage to the landing station when the alleged father and son made the two trips to Hongkong and

the occupants of the last or sixth house in the fifth row.

Testimony of alleged father, Lim Kee:

Q. Did anyone go to Hongkong with you and the applicant on that trip? (meaning second trip).

A. No. There was a man carried the baggage out to the passage boat from the home village.

Q. Where did you and the applicant first board a steamer after leaving your village for Hongkong on your last trip?

A. Mar Jow village.

Q. How far is that from your village?

A. Five or six lis.

Q. *What was the name of the man who carried your baggage?*

A. *Lum Chee Jow.*

Q. *Where does he live?*

A. *He lives in the*

Testimony of appellant, Lim Chan:

Q. In C. R. 5-5 when you and your father started for Hongkong where did you first board the steamer after leaving your home village?

A. We first took a boat about a po from Goo Jeung.

Q. What is the name of that place?

A. I don't know the name of it.

Q. *Did anyone go with you and your father to carry the baggage to that place?*

A. *My brother, Lum Loy, carried our baggage.*

Q. *Any one else?*

A. *No.*

Q. Did anyone carry your baggage when you and your father started for Hongkong in C. R. 5-3?

last house which is the sixth in our row.

Q. *Is he married?*

A. *No.*

Q. *How old is he?*

A. *16 or 17.* (Ex. "A," p. 29).

Q. Has he any brothers or sisters?

A. No.

Q. What is the name of his father?

A. I don't remember. His father has been dead a long time.

Q. Is his mother living?

A. Yes. She lives with him. (Ex. "A," p. 28).

Q. When you and the applicant went to Hongkong in C. R. 5-5, (1916) which was your second trip with him to Hongkong, you stated that Lum Chee Jow carried your baggage to the landing place. Did any one else accompany you to that place?

A. Just us three.

A. *No one carried it but myself.*

Q. *Who lives in the last house of your row?*

A. *Lum Dot Loy.*

Q. Has he another name?

A. I don't know his other name.

Q. *Is he married?*

A. *Yes.*

Q. *Any children?*

A. *One son, no daughter.*

Q. *What is the boy's name and age.*

A. *Lum Chew, 40 years old.*

Q. Is Lum Chew married?

A. I don't know.

Q. *Do you know any boy in your village by the name of Lum Chee Jow?*

A. *No.* (Ex. "A," p. 20).

Q. Why didn't your son, Lum Loy, go with you as far as the landing place?

A. Because we left home so early in the morning. He had not gotten up yet.

Q. *When you and the applicant went to Hongkong in C. R. 5-3, did anyone carry your baggage to the landing place?*

A. *Yes. Lum Chee Jow and another man whose name I cannot remember at the moment—Lum Wah.* (Ex. "A," p. 19).

Q. Did you take Lum Loy as far as the landing place in C. R. 5-3, or did he remain in the home village?

A. He walked out a little distance with us and then returned home.

Q. What do you mean by a little distance?

A. About half way. (Ex. "A," p. 18).

Who carried the baggage to the landing place on the second trip?

Alleged father testifies:

Q. What was the name of the man who carried your baggage?

A. *Lum Chew Jow.* (Ex. "A," p. 29).

Q. *Why didn't your son, Lum Loy, go with you as far as the landing place?*

A. *Because we left home so early in the morning. He hadn't gotten up yet.* (Ex. "A," p. 19).

Alleged son testifies:

Q. Did anyone go with you and your father to carry the baggage to that place?

A. *My brother, Lum Loy, carried our baggage.* (Ex. "A," p. 20).

Here the alleged father testifies that Lum Chew Jow carried their baggage to the landing place and that the other son and brother, Lum Loy, did not accompany them. The alleged son testifies that his brother, Lum Loy, carried the baggage.

Who carried the baggage to the landing place on the first trip?

Alleged father testifies:

Q. When you and the applicant went to

Alleged son testifies:

Q. Did anyone carry your baggage when you and your father started

Hongkong in C. R. 5-3, did anyone carry your baggage to the landing place?

A. Yes. Lum Chee Jow and another man whose name I cannot remember at the moment—Lum Wah. (Ex. "A," p. 19).

for Hongkong in C. R. 5-3?

A. *No one carried it but myself.* (Ex. "A," p. 20).

Who lives in the last or sixth house in the fifth row?

Alleged father testifies:

Q. *Where does he live* (meaning Lum Chee Jow).

A. He lives in the last house, which is the sixth in our row.

Q. *Is he married?*

A. *No.*

Q. *How old is he?*

A. *16 or 17.* (Ex. "A," p. 29).

Q. Has he any brothers or sisters?

A. No.

Q. What is the name of his father?

A. I don't remem-

Alleged son testifies:

Q. *Who lives in the last house of your row?*

A. *Lum Dot Loy.*

Q. *Is he married?*

A. *Yes.*

Q. *Any children?*

A. *A son, no daughter.*

Q. What is the boy's age and name?

A. *Lum Chew, 40 years old.*

Q. Is Lum Chew married?

A. I don't know.

Q. *Do you know any boy in your village by*

ber. His father has been dead a long time.

Q. Is his mother living?

A. Yes. She lives with him. (Ex. "A," p. 28).

the name of Lum Chee Jow?

A. *No.* (Ex. "A," p. 20).

Here the alleged father testifies that Lum Chee Jow, 16 or 17 years of age, not married, lives with his mother in the sixth or last house in his row, while the alleged son testifies that Lum Dot Loy, with his wife and one son, Lum Chew, 40 years of age, lived in the house in question, and that he, the alleged son, does not know any boy in his village named Lum Chee Jow.

TENTH. As to whether or not Lim Hawn, the identifying witness, took some old clothes and a letter from the alleged father in this country to his home in China in 1911. All three witnesses in their present testimony agree that Lim Hawn did take said bundle and letter to China. This, however, is in direct contradiction of Lim Hawn's testimony on his return from China in 1912, as follows:

> Q. When you returned from China in 1912, you stated on board ship that you did not take any money, letters or anything else from anyone in the United States to China. Now you state you did. How do you account for that?

A. I stated that I never carried any money to anyone.

Q. The records show that in addition to that you stated you did not take any letters or anything else from the United States to anyone in China.

A. They never asked me anything about a letter, only about money. (Ex. "A," p. 25).

We have pointed out these various discrepancies in the record, hoping that by so doing it may aid the Court in its review of the record. There are other discrepancies in the testimony, but it does not appear to us to be necessary to dwell upon them here.

Counsel for petitioner in his brief has attempted to minimize these discrepancies and to offer various reasons and excuses in explanation thereof. In this attempt, however, we believe he has failed. After quoting at some length from J. Dyer Ball's Work, "Things Chinese," Page 11 of Brief, he says:

> "After reading the above, could there be any just or reasonable criticism for a variance between the testimony of the appellant and his father as whether the women in the houses adjoining his had bound or natural feet. Where an examination refers to the immediate family, uniformity in this regard would be expected, but, when referring to the women neighbors, it is an entirely different matter."

If, as suggested by counsel, appellant and his alleged father could have had no knowledge as to whether or not the women concerning whom they testified had natural or bound feet, they should have so testified in answer to the questions put to them. But in this case, both profess to know the condition of these women's feet whether bound or unbound or natural, and both testified concerning that fact without any qualifications whatever. The only instances in which they are in agreement concerning this point, with the exception of the members of the immediate household, are in the cases of the school teacher's wife, and Lum Fook's wife, who lives next door. In the other instances, the alleged father testifies that the women have bound feet and the alleged son that they have natural feet.

Again, on Page 12 of Brief, counsel for appellant says:

> "The point that we desire to make with respect to these matters of discrepancy is that they were the determining factors which caused the examining inspector to discredit the case."

It is true that the examining inspector based his recommendation of a denial of the case on the discrepancies appearing in the testimony as shown in his summary of the case on Page 42 of the Immigration Record.

It was because of these same discrepancies that the Secretary of Labor dismissed the appeal in this case and ordered appellant's deportation, as shown by the record as follows:

> "Certainly the features enumerated above in this case should be matters of more exact corroboration than has been found. It can hardly be conceived that a father and son, especially when the father, has been in China within so recent a period, would not agree on the features mentioned. The lack of agreements, then, are considered such as to justify the Port authorities in their debarring decision, and as showing that the relationship claimed has not been satisfactorily established. It is, therefore, recommended that the excluding decision be affirmed. (Ex. "A," p. 60). * * * The case has not, in the opinion of the Bureau, been strengthened. It is accordingly recommended for the reasons set forth in the Bureau's prior memorandum, that the appeal be dismissed and deportation ordered. (Ex. "A," p. 67).
>
> A. Caminetti, Commissioner-General,
>
> Approved by
>
> John W. Abercrombie, Acting Secretary."

If there were no discrepancies in the testimony, there would in this case be no grounds on which to base a denial, and to do so, would then be an abuse of discretion on the part of the Immigration officials authorized by law to finally determine these matters.

It is a matter of common knowledge among Government officials having to do with the handling of

Chinese immigation that Chinese merchants who, because of their status as such, are entitled to bring into the United States their wives and minor children, having no children of their own or having children who do not desire to come to this country or who refuse so to come, oftentimes bring in or attempt to bring in as their own, children of other Chinese who are not entitled to admission under the law. When such an attempt is made, it is of course necessary that the applicant become familiar with the home and family conditions of the man whose son he claims to be, knowing as they do that they will be required to testify regarding these matters. To accomplish this end, the applicant is placed in the home of the alleged father for a few weeks or months, as the case may be, that he may acquaint himself with local conditions and be able to corroborate the testimony of the alleged father concerning such matters.

In such cases, it a very easy matter for the applicant and his alleged father to testify in perfect agreement concerning the home and family relations, but it is practically impossible for them to anticipate and prepare for all the other matters concerning which they *may be called upon* to testify which, as in this case, may give rise to serious dis-

crepancies of such a kind and character, as to discredt the claim to relationship.

This condition undoubtedly obtained in the case at bar.

This conclusion is amply supported by the conflicting testimony of the alleged son and his alleged father concerning their first trip from the home village to Hongkong, at which time the alleged father testifies that he sprained his ankle so badly that he was unable to walk *without the assistance of his son,* while the alleged son disclaims any knowledge whatever of such an accident. It may well be that the alleged father did sprain his ankle on this first trip to Hongkong and the alleged son have no knowledge of that fact, for the reason that the alleged son was not present with his alleged father on that trip when the accident happened and had never been in the alleged father's home village until he went there with him upon the alleged father's return from his first trip to Hongkong for the purpose of acquainting himself with conditions in that household in preparation for his coming to the United States.

The alleged father's first visit to Hongkong was undoubtedly for the purpose of getting appellant and taking him to his home in China where he was to live a few months before coming to the United

States, which accounts for appellant's lack of knowledge concerning his alleged father's sprained ankle and the other facts concerning which they disagree.

AS TO ABUSE OF DISCRETION.

The discrepancies in the testimony considered individually may not seem to have any direct bearing on the question of relationship, but when considered collectively, they show such a lack of agreement concerning matters of intimate family history and village conditions concerning which the witnesses should have common knowledge as to give rise to serious and justifiable doubts as to the existence of the relationship claimed, and, as the burden of proof is, under the law, upon the appellant to prove his status, the discrepancies are sufficient to justify the action of the said Secretary in denying appellant's admission.

Because of these discrepancies, the acting Secretary was placed in a position where, under the circumstances, it was necessary for him to exercise the discretionary power committed to him by law in the determination of the matter before him. He could have, in the exercise of this discretion, decided the case either in favor of or against the appellant and whichever way he decided, his reasons for so doing could not be questioned, otherwise, his authority over such matters would be nullified.

DOES THE RECORD DISCLOSE A MANIFEST ABUSE OF DISCRETION?

Disrcetion—when applied to judges or public functionaries—means a liberty, power or right conferred upon them by law, of acting officially in certain circumstances within the confines of right and justice, according to the dictates of their own conscience, uncontrolled by the judgment or conscience of others, and independent of narrow and unbending rules of positive law, to decide and act in accordance with what is fair and equitable on the peculiar circumstances of the case and as discerned by his personal wisdom and experience, guided by the spirit, principles and analogies of the law.

Abuse of discretion is defined by Corpus Juris as follows:

> "A discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence; a clearly erroneous conclusion and judgment—one that is clearly against the logic and effect of such facts as are presented in support of the application, against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing." 1 C. J. 372.
>
> ABUSE JUSTIFYING INTERERENCE.
>
> "The 'abuse of discretion,' to justify interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, par-

tiality or moral delinquency. 29 Ind. A. 395; 62 N. E. 107-111."

1 C. J. 372.

"The exercise of an honest judgment, however erroneous it may appear to be, is not an abuse of discretion. Abuse of discretion and especially gross and palpable abuse of discretion, which are terms ordinarily employed to justify an interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. 29 N. Y. 418, 431."

1 C. J. 372.

"Difference in judicial opinion is not synonymous with abuse of judicial discretion. 62 N. J. L. 380, 383."

1 C. J. 372.

In *Lou Wah Suey vs. Backus,* 225 U. S. 460, (56 L. Ed. 1167) which seems to be the latest case in point, the Court, speaking through Mr. Justice Day says:

"A series of decisions in this Court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a *manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the*

> *authority of the statute is final. U. S. vs. Jy Toy,* 198 U. S. 253, 49 L. Ed. 1040, 25 Sup Ct. Rep. 644; *Chin Yow vs. U. S.* 208 U. S. 8, 52 L. Ed. 369, 28 Sup. Ct. Rep. 201; *Tang Tum vs. Edsell,* 223 U. S. 673."

Without again enumerating the various discrepancies in the record, we confidently urge and believe that the action of the Secretary of Labor in denying appellant the right to enter the United States and ordering his deportation is justified by the facts disclosed in the record, and to hold that such order and finding was a manifest abuse of the discretion committed to the Secretary by the statute would be to substitute the discretion of the Court for that of the Acting Secretary.

This Court, speaking through his Honor, Judge Morrow, in *White vs. Gregory,* 213 Fed. 768-770, says:

> "In reaching this conclusion the officers gave the aliens the hearing provided by the statute. This is as far as the Court can go in examining such proceedings. It will not inquire into the suffiicency of probative facts, or consider the reasons for the conclusions reached by the officers."

Again, in *Lee Ah Yin vs. U. S.,* 116 Fed. 614, 615, this Court, speaking through his Honor, Judge Gilbert, held that

> "There were inconsistencies in the evidence which may well have caused the commissioner and the Court to doubt its truth, and there were circumstances which tended to impeach the evidence of the plaintiff in error. We cannot say that the judgment was clearly against the weight of the evidence."

In the recent case of *Jeung Bock Hong and Jeung Bock Ning vs. White,* 258 Fed. 23, the Court, speaking through his Honor, Judge Morrow, said:

> "The discrepancies in the testimony appear to be unimportant but if taking them altogether the Executive officers of the Department found that the evidence in support of the petitioner's right to land and enter the United States was so impaired as to render it unsatisfactory, the Court is not authorized to reverse that conclusion."

AS TO UNFAIRNESS.

In this connection we firmly believe the Court will find from an inspection of the record that every opportunity was afforded appellant to present any and all evidence in support of his claims and that all of the witnesses so presented were fully and fairly heard. In the case of *Chin Low vs. U. S.,* 208 U. S. 8, the Court says:

> "The question is, whether he is entitled to habeas corpus in such a case. If the petitioner was not denied a fair opportunity to produce

the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. These facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts open the merits of the case, whether those facts are proved or not. And by way of caution, *we may add, that jurisdiction would not be established simply by proving that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced.* But supposing that it could be shown to the satisfaction of the District Judge that the petitioner had been allowed nothing but the semblance of a hearing as we assume to be alleged, the question is, we repeat, whether habeas corpus may not be used to give the petitioner the hearing that he has been denied. But unless and until it is proven to the satisfaction of the Judge that a hearing properly so called, was denied, the merits of the case are not open."

We take this to be the true rule and earnestly insist that the record clearly shows that appellant was not denied the opportunity of a fair hearing.

This Court, in the case of *Jeung Bock Hong, etc., supra*, held as follows:

"We cannot say that the proceedings were manifestly unfair or that the actions of the executive officers were such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the

statute. In such cases, the order of the executive officers within the authority of the statute is final."

Respectfully submitted,

ANNETTE ABBOTT ADAMS,
United States Attorney,

BEN F. GEIS,
Asst. United States Attorney,
Attorneys for Appellee.

No. 3377

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LIM CHAN,
Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration for the port of San Francisco,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

GEO. A. McGOWAN,
Bank of Italy Building, San Francisco,

HEIM GOLDMAN,
Mills Building, San Francisco,

Attorneys for Appellant and Petitioner.

FILED
MAR - 2 1920
F. D. MONCKTON,
CLERK.

No. 3377

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LIM CHAN,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration for the port of San Francisco,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

This appellant respectfully petitions this court for a rehearing of the judgment filed herein on the 2nd day of February, 1920, wherein the decree of the lower court was affirmed. In its opinion this court held that the principle involved in the case of Quan Hing Sun v. White, 254 Fed. 402, and Jeung

Quey How v. White, 258 Fed. 618, could not be invoked upon behalf of this appellant for the reason that it was not specifically assigned as error, and citing as authority the recent cases of Jeung Bock Hong et al. v. White, 258 Fed. 23, and Louie Share Gan v. White, 258 Fed. 798. In this connection appellant refers to the order submitting the demurrer to the petition as contained on page 14 of the Transcript, wherein the immigration record was by consent deemed to *"be considered as part of the original petition"*. It therefore is apparent that plain error was committed and involved in the proceeding as pending before the lower court, and that the four general assignments of error as contained on page 21 of the Transcript were therefore sufficient assignments to sustain the point made, because it appeared upon the face of the immigration record, which by stipulation was deemed an *amendment to the petition* that the detained had not been given a hearing before a Board of Special Inquiry.

This court, in the case of Hopkins v. Fachant, 130 Fed. 839, affirmed the discharge of a woman from custody upon a ground which not only was not involved in the record of the case as made up before the lower court, but upon a ground which actually took place after the case was at issue, and hence could have no part in the pleadings, and it is therefore felt that where this court has actually in practice sanctioned the recognition of an error brought

to its attention upon the hearing even though not involved in the pleadings, that it should in the present case recognize and render assistance to this appellant, where the error complained of was patent upon the face of the immigration record which by the said stipulation was deemed part and parcel of the original petition.

2 Cyc. 678 the doctrine is asserted that:

> "An exception to the general rule that an appellate court will not consider objections first raised on appeal—exists in the case of errors apparent on the face of the record; these may be considered by the court, though not objected to below."

See, also:

> 2 Cent. Dig., title Appeal and Error, Sec. 1145 et seq.;
>
> Bennett v. Butterworth, 11 Howard 669; 13 L. Ed. 859;
>
> Garland v. Davis, 4 How. 131; 11 L. Ed. 907;
>
> Kentucky L. Ins. Co. v. Hamilton, 63 Fed. 93.

2 Cyc. 715 it is stated:

> "But where error appears in the record proper, the appellate or reviewing court may correct it notwithstanding that no exception was taken thereto."

See, also, to the same effect

> 2 Cent. Dig. title "Appeal & Error", Sec. 1147;
>
> Macker v. Thomas, 7 Wh. 530; 5 L. Ed. 515.

When the entire record is brought up, as in the case at bar, the immigration record being by stipulation, a part of the pleadings, the court may reverse upon a defect not noticed in the court below, and even of its own motion, one not pointed out by counsel.

Garland v. Davis, supra.

It has also been held by our highest court that if error is apparent upon any part of the record, it is open to review, whether found in the bill of exceptions or elsewhere.

Suydam v. Williamson, 20 How. 427; 15 L. Ed. 978.

The Supreme Court has also held many times that an appellate court will notice a plain error in the record even though there be no specific assignment of error, and that there was no presumption in favor of a judgment where error is apparent in the record.

Wiborg v. U. S., 163 U. S. 632;
Rowe v. Phelps, 152 U. S. 87;
Stevenson v. Barbour, 140 U. S. 48;
United States v. Pena et al., 175 U. S. 500;
Reynolds v. U. S., 98 U. S. 145;
U. S. v. Wilkinson, 12 How. 246.

In finally submitting this motion we feel that the court possibly did not note the stipulation that the immigration record was deemed part and parcel of the petition, thus making it in effect a part of the pleadings and bringing it within the protec-

tion of the rules and principles herein contended for, and that therefor the motion for a rehearing should be granted.

Dated, San Francisco,
March 1, 1920.

Respectfully submitted,

Geo. A. McGowan,
Heim Goldman,
Attorneys for Appellant and Petitioner.

Certificate of Counsel.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
March 1, 1920.

Geo. A. McGowan,
Of Counsel for Appellant and Petitioner.

No. 3378

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALASKA MINES CORPORATION, a Corporation,

Appellant,

vs.

HERBERT GREENBERG,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Territory of Alaska, Second Division.

FILED
SEP 29 1919
F. D. MONCKTON,
CLERK.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3378

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALASKA MINES CORPORATION, a Corporation,

Appellant,

vs.

HERBERT GREENBERG,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Territory of Alaska, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Affidavit of O. D. Cochran	125
Affidavit of Hugh O'Neill	129
Amended Reply	63
Answer	24
Answer to Motion for Order Directing that George K. McLeod be Made Party Plaintiff to Action	97
Assignment of Errors	175
Bill of Exceptions	95
Certificate of Clerk U. S. District Court to Transcript of Record	182
Citation on Appeal	184
Complaint	1
Decree	90
Demurrer	22
DEPOSITIONS ON BEHALF OF PLAINTIFF:	
GILMORE, WILLIAM A.	139
GREENBERG, HERBERT	132
Cross-examination	134
Redirect Examination	135

Index. Page

EXHIBITS:

Exhibit "A" Attached to Complaint—Mortgage Dated April 17, 1917, Between Alaska Mines Corporation and Herbert Greenberg 9
Exhibit "B" Attached to Answer—Complaint 34
Exhibit "C" Attached to Answer—Affidavit of George K. McLeod 37
Exhibit "D" Attached to Answer—Writ of Attachment 57
Exhibit "E" Attached to Answer—Notice of Attachment 59
Exhibit "F" Attached to Answer—Return of Sheriff Showing Service of Writ of Attachment 61
Plaintiff's Exhibit "A" Attached to Answer to Motion for Order Directing that George K. McLeod be Made Party Plaintiff to Action—Agreement Dated April 17, 1917, Between Herbert Greenberg and Alaska Mines Corporation.. 99
Plaintiff's Exhibit "B" Attached to Answer to Motion for Order Directing that George K. McLeod be Made Party Plaintiff to Action—Agreement Dated October 9, 1914, Between George K. McLeod and Herbert Greenberg...... 111
Plaintiff's Exhibit "B"—Letter from William A. Gilmore to Empire Trust Company 140

Index. Page

EXHIBITS—Continued:

Plaintiff's Exhibit "C" Attached to Answer to Motion for Order Directing that George K. McLeod be Made Party Plaintiff to Action—Promissory Note Dated April 17, 1919, Alaska Mines Corporation to Herbert Greenberg.... 117

Plaintiff's Exhibit "C"—Telegram Dated Jan. 15th, Empire Trust Company to William A. Gilmore.................. 142

Plaintiff's Exhibit "D" Attached to Answer to Motion for Order Directing that George K. McLeod be Made Party Plaintiff to Action—Letter Dated April 17, 1917, George K. McLeod to Herbert Greenberg 118

Plaintiff's Exhibit "D"—Letter Dated January 15, 1918, M. J. Vance to William A. Gilmore 144

Plaintiff's Exhibit "E" Attached to Answer to Motion for Order Directing that George K. McLeod be Made Party Plaintiff to Action—Order Discharging Lien of Attachment...... 119

Plaintiff's Exhibit "E"—Letter Dated January 15, 1918, Walter S. Reed to Empire Trust Company 146

Plaintiff's Exhibit "F"—Letter Dated January 24, 1918, Beekman, Menken & Griscom to William A. Gilmore....... 148

Index. Page

EXHIBITS—Continued:
Plaintiff's Exhibit "G"—Night Lettergram Dated February 1, 1918, William A. Gilmore to Beekman, Menken & Griscom 151
Plaintiff's Exhibit "H"—Telegram Dated February 2, 1918, Beekman, Menken and Griscom to William A. Gilmore.. 152
Plaintiff's Exhibit "I"—Night Lettergram, Dated February 6, 1918, Beekman, Menken and Griscom to William A. Gilmore 153
Plaintiff's Exhibit "J"—Telegram, William A. Gilmore to Beekman, Menken and Griscom 154
Plaintiff's Exhibit "K"—Night Lettergram Dated February 8, 1918, Beekman, Menken and Griscom to William A. Gilmore 156
Plaintiff's Exhibit "L"—Telegram Dated February 20, 1918, Beekman, Menken and Griscom to William A. Gilmore.. 157
Plaintiff's Exhibit "O"—Order of Release 160
Findings of Fact and Conclusions of Law...... 67
Judgment 90
Minutes of Court—February 15, 1919—Order Granting Leave to Amend Original Answer by Interlineations by Clerk......... 62
Motion for Continuance 124
Motion for Order Directing that George K. McLeod be Made Party Plaintiff to Action... 95

Index. Page

Order Allowing Appeal.......................... 170
Order Approving Bond 174
Order Extending Time to Docket Appeal...... 181
Order Overruling Demurrer 23
Petition for Order Allowing Appeal........... 168

TESTIMONY ON BEHALF OF PLAINTIFF:

BURROUGHS, E. W.................... 159
COCHRAN, O. D. 164
O'NEILL, HUGH 159
Cross-examination 160
POWELL, MORTON 158

Undertaking on Appeal 171

In the District Court for the Territory of Alaska, Second Division.

No. 2779.

HERBERT GREENBERG,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,

Defendant.

Complaint.

Plaintiff complains of defendant and for cause of action alleges:

1.

That said defendant, Alaska Mines Corporation, is a corporation organized and existing under the laws of the State of Virginia, and is authorized to and is transacting business in the Territory of Alaska.

2.

That heretofore, to wit, on the 17th day of April, 1917, for value received, the defendant corporation by James Gayley, its president, thereunto duly authorized, made, executed and delivered to Herbert Greenberg, plaintiff herein, its series of three certain promissory notes in words and figures following, to wit:

SCHEDULE "A."

$5,000.00. New York, April 17, 1917.

On or before June 15th, 1917, for value received, the undersigned, Alaska Mines Corporation, promises to pay to Herbert Greenberg, or order, at Empire Trust Company, 120 Broadway, in the Borough of

Manhattan, City of New York, the sum of five thousand dollars ($5,000.00) with interest at the rate of six per centum per annum, payment to be made in gold coin of the United States. If suit shall be commenced for recovery of any amount due upon this note, the undersigned agrees to pay, as attorney's fees thereon, such additional sum as the Court may adjudge reasonable.

This note is one of a series of three, aggreegating the sum of forty thousand dollars ($40,000) all secured by a certain mortgage, executed by the undersigned, of even date herewith, and it is hereby stipulated that if this note or any of them, is not paid on the day when due, and default shall continue as provided in said mortgage all of said notes shall become due and payable.

ALASKA MINES CORPORATION,
By JAMES GAYLEY, President. [1*]

SCHEDULE "A"—2.

$10,000.00.

On or before November 15th, 1917, for value received, the undersigned, Alaska Mines Corporation, promises to pay to Herbert Greenberg, or order, at Empire Trust Company, 120 Broadway, in the Borough of Manhattan, City of New York, the sum of Ten Thousand Dollars ($10,000) with interest at the rate of six per centum per annum, payment to be made in gold coin of the United States. If suit shall be commenced for recovery of any amount due upon this note, the undersigned agrees to pay as attorney's

*Page-number appearing at foot of page of original certified Transcript of Record.

fees thereon, such additional sum as the Court may adjudge reasonable.

This note is one of a series of three, aggregating the sum of forty thousand dollars ($40,000) all secured by a certain mortgage, executed by the undersigned, of even date herewith, and it is hereby stipulated that if this note, or any of them, is not paid on the day when due, and default shall continue as provided in said mortgage all of said notes shall become due and payable.

ALASKA MINES CORPORATION,
By JAMES GAYLEY,
President.

SCHEDULE "A"—3.

$25,000.00.

On or before January 15th, 1918, for value received, the undersigned, Alaska Mines Corporation, promises to pay to Herbert Greenberg, or order, at Empire Trust Company, 120 Broadway, in the Borough of Manhattan, City of New York, the sum of twenty-five thousand dollars ($25,000) with interest at the rate of six per centum per annum, payment to be made in gold coin of the United States. If suit shall be commenced for recovery of any amount due upon this note, the undersigned agrees to pay, as attorney's fees thereon such additional sum as the Court may adjudge reasonable.

This note is one of a series of three, aggregating the sum of forty thousand dollars ($40,000) all secured by a certain mortgage, executed by the undersigned, of even date herewith, and it is hereby stipulated that if this note, or any of them, is not paid

on the day when due, and the default shall continue as provided in said mortgage, all of said notes shall become due and payable.

ALASKA MINES CORPORATION.
By JAMES GAYLEY,
President.

3.

That contemporaneously with the execution and delivery of said promissory notes the said defendant, to secure the payment thereof, made, executed and delivered to plaintiff a certain indenture of mortgage of real and personal property situated in the Cape Nome Recording Precinct, Territory of Alaska, Second Division, a true copy of which said mortgage is hereto annexed, made a part of this complaint, and marked Exhibit "A." [2]

4.

That at the time of the execution of said mortgage the said defendant was and still is the owner of the real and personal property described in said mortgage and thereby mortgaged to plaintiff.

5.

That said mortgage was duly executed by the said defendant in the presence of two witnesses who signed the same as witnesses thereto, and was duly acknowledged by the said defendant, Alaska Mines Corporation, by its said President James Gayley, who was thereunto duly authorized before a notary public so as to entitle it to be recorded, and at the time of the execution of said mortgage there was attached thereto the affidavits of Walter S. Reed, the Secretary of said corporation mortgagor, who was thereunto duly authorized, and Herbert Greenberg, the mortgagee

therein named, which said affidavits were to the effect that said mortgage was made in good faith to secure the amount named therein and without any design to hinder, delay or defraud creditors.

6.

That said mortgage was thereafter on the 11th day of June, 1917, filed for record and recorded in the office of the recorder of deeds and mortgages of Cape Nome Precinct, Territory of Alaska, Second Division, in Volume 193, page 154, and was also on the 10th day of August, 1917, filed in said office as a chattel mortgage and ever since has been and now is on file therein.

7.

That the said defendant, Alaska Mines Corporation, has not paid said promissory notes in said mortgage set out and designated "Schedule A," "Schedule A–2" and "Schedule A–3," except the promissory notes marked "Schedule A" and "Schedule A2"; and that no part of said promissory note designated and marked "Schedule A3," or any interest due thereon, has been paid, except the sum of $2,500.00 on the 17th day of April, 1917, and the same is now and for a [3] long time past has been due and payable from the defendant to the plaintiff.

8.

That notice and demand in writing were duly served on said defendant corporation by plaintiff as provided in said mortgage after said promissory note marked "Schedule A3" became due, and a period of more than sixty days has elapsed since said notice and demand in writing were so served as aforesaid, and said defendant has been and still is in default of

the payment thereof and no part of said promissory note designated "Schedule A3," or any part of the interest accrued thereon, has been paid except as above stated, and the whole thereof with interest is now due, owing and unpaid from the defendant to the plaintiff.

9.

That the personal property mentioned and described in said mortgage is now in the possession of the said defendant, its agents and bailees in the Precinct, Territory and Division aforesaid.

10.

That plaintiff is the lawful owner and holder of said mortgage and said promissory note designated "Schedule A3."

11.

That no proceedings have been had at law or otherwise for the recovery of said sum and interest due on said promissory note marked "Schedule A3," or any part thereof.

12.

That the sum of Three Thousand ($3,000.00) Dollars is a reasonable sum to be allowed the plaintiff for attorney's fees, for the commencement and prosecution of this action to foreclose said mortgage.

And for a further and separate cause of action against the said defendant plaintiff alleges:

1.

Plaintiff realleges and reaffirms and adopts as a part [4] of this cause of action all the foregoing allegations of this complaint.

2.

That the personal property described in and cov-

ered by the said mortgage hereto annexed, marked Exhibit "A" and made a part of this complaint and of this count and cause of action, is now in the possession of the defendant, Alaska Mines Corporation, its agents and bailees, in the said Cape Nome Precinct, Territory of Alaska, Second Division.

3.

That the plaintiff by reason of the breach of the conditions of the aforesaid mortgage is lawfully entitled to the possession thereof by virtue of having a special property therein created by and by reason of said mortgage and the nonpayment of the said promissory note marked "Schedule A3" mentioned therein.

4.

That the said personal property is wrongfully detained by the defendant although plaintiff is entitled to the immediate possession of the same as aforesaid.

5.

That the alleged cause of the detention thereof according to the best knowledge, information and belief of plaintiff is because the said defendant claims to be the owner thereof.

6.

That said personal property has not been taken for a tax, assessment or fine, pursuant to any statute, or seised under an execution or attachment against the property of the plaintiff.

7.

That the value of said personal property is Thirty Thousand ($30,000.00) Dollars.

WHEREFORE plaintiff prays judgment against the defendant:

First. For judgment against the said defendant, Alaska Mines Corporation, a corporation, for the sum of Twenty-two [5] Thousand Five Hundred ($22,500.00) Dollars, together with interest thereon from the 17th day of April, 1917, at the rate of six per cent per annum, for the sum of Three Thousand ($3,000.00) Dollars attorney's fees and costs of suit.

Second. That said mortgage herein mentioned and hereto annexed be foreclosed in the manner provided by law, and the real and personal property therein described sold in the manner provided by law, and the proceeds thereof applied to the payment of the amount found due to the plaintiff on said promissory note designated "Schedule A3," together with interest, attorney's fees and costs, and that any surplus be delivered to the said defendant.

Third. For the recovery of the possession immediately of the personal property described in said mortgage and the subsequent sale thereof to satisfy the plaintiff's demand.

Fourth. To all other relief to which the plaintiff in equity may be entitled, including costs of suit.

J. F. HOBBES,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

J. F. Hobbes, being first duly sworn, deposes and says:

That he is the attorney for the above-named plaintiff, that he prepared the foregoing complaint, knows the contents thereof, and that the same is true as he verily believes.

That the reason why this complaint is not verified by the plaintiff is because said plaintiff is without the Territory of Alaska and is unable to verify to same.

J. F. HOBBES.

Subscribed and sworn to before me this 18th day [6] of April, 1918.

[Notarial Seal] M. WARD GRIFFITH,

Notary Public, Territory of Alaska, Residing at Nome.

My commission expires August 15th, 1920. [7]

Exhibit "A."

#65687.

THIS INDENTURE OF MORTGAGE made and entered into this 17th day of April, 1917, between Alaska Mines Corporation, a corporation organized and existing under and pursuant to the laws of the Commonwealth of Virginia, party of the first part (hereinafter referred to as the "Mortgagor"), and Herbert Greenberg, of Nome, Alaska, party of the second part (hereinafter referred to as the "Mortgagee"), WITNESSETH:

The Mortgagor, for and in consideration of the sum of One Dollar ($1.00) or other valuable considerations to it in hand paid by the Mortgagee, the receipt whereof is hereby acknowledged, and in order to secure the payment to the Mortgagee of the sum of Forty Thousand dollars ($40,000) as evidenced by three promissory notes in writing, aggregating said sum, made, and executed and delivered by the Mortgagor to the Mortgagee, all bearing even date here-

with, copies of which are hereto annexed, marked "Schedule A," does hereby grant, bargain, sell, and convey unto the Mortgagee, his heirs, executors, administrators and assigns, all of the following described real and personal property situate in the Cape Nome Mining District, Seward Peninsula, Territory of Alaska;

An undivided fifty-one per cent, interest in The Holyoke No. 2 Claim on Holyoke Creek, a tributary of Bourbon Creek, a tributary of Dry Creek, a tributary of Snake River, together with a dredge hull and all timbers, steel, iron, bolts and appliances purchased for the same, situated on said The Holyoke No. 2 Claim on Holyoke Creek or stored for said hull, and wherever situated.

TO HAVE AND TO HOLD the above granted premises unto the Mortgagee, his heirs, executors, administrators and assigns forever. The above property being the same property conveyed and transferred by the Mortgagee to the Mortgagor by deed and bill of sale bearing even date herewith, this mortgage and the notes secured hereby being given to secure payment of a part or portion of the purchase money consideration paid for said property. Provided always that if the Mortgagor or its successors and assigns shall pay unto the Mortgagee or his heirs, executors, administrators and assigns, the said sums of money mentioned in the aforesaid promissory notes and the interest thereon, at the time and in the manner mentioned in the said promissory notes, then and in that event these presents and the estate hereby granted shall cease, determine and become void.

And the parties hereto covenant and agree as follows:

FIRST: That the Mortgagor will pay the indebtedness as provided in this mortgage, and if default be made in the payment of any note, and such default shall continue for a period of sixty days after notice and demand in writing, then and in such event all of said notes immediately and forthwith shall become due and payable, and it shall be lawful for the Mortgagee, his heirs, executors, administrators, and assigns, to take immediate possession of all the personal property hereinbefore conveyed and transferred, and sell the same at public sale in the manner provided by law, and apply the proceeds as far as may be, to the payment of the amount then due, together with the costs and expenses of sale, including all reasonable expense of taking possession of, keeping and caring for said personal property. The United States Marshal*l* of the Second District of the District of Alaska is hereby authorize*s* to execute the power of sale herein granted to said Mortgagee, his heirs, executors, administrators and assigns, or in case of such default and its continuance as aforesaid, the Mortgagee may proceed to foreclose this mortgage by suit at law in any court of competent jurisdiction. Notwithstanding this mortgage, the real and personal*y* property hereinbefore mentioned may remain in possession of the Mortgagor until default and its continuance as aforesaid.

SECOND: That if default be made in the payment of any of said notes when due, the said default shall continue for a period of sixty days after notice and demand in writing, or if default shall be made in the

payment of any interest, taxes, or assessments and such default shall continue for a period of sixty days after like notice and demand, then and in such *even* all of said notes immediately and forthwith shall become due and payable and the Mortgagee shall have power to sell the realty herein described according to law, and that upon such default, and its continuance as *f*oresaid. [8] The Mortgagee shall have the right forthwith to enter upon the mortgaged premises, receive all of the proceeds, rents, issues, and profits therefrom and apply the same, after payment of all necessary charges and expenses, on account of the amount hereby secured, and said proceeds, rents, issues, and profits are, in the event of such default, and its continuance as aforesaid, hereby assigned to the Mortgagee.

THIRD: That the Mortgagee shall have the right upon any such default and the continuance of such default as aforesaid, and upon the commencement of any proceedings to foreclose this mortgage, to apply for and shall be entitled, as a matter of right without consideration of the val*e*ue of the mortgaged premises as security for amounts due the Mortgagee or of the solvency of any person or persons liable for the payment of such amounts to the appointment of a receiver of the rents, issues, and profits or other proceeds from the real property above mortgaged.

FOURTH: That the Mortgagee may at his option, pay any lawful tax, charge, or assessment upon said property and said payment together with expenses incurred in connection therewith shall become part*y* of the principal sum due from the Mortgagor to the Mortgagee;

FIFTH: That any notice required herein to be given by the Mortgagee to the Mortgagor may be either personally served or be served by mail through the United States postoffice by registered letter addressed to the Mortgagor at its principal place of business in the Territory of Alaska, or its office in the Borough of Manhattan, City of New York, or it may be served upon the agent of the Mortgagor appointed in Alaska pursuant to statute.

SIXTH: That the Mortgagor shall pay over to the Mortgagee fifteen per cent of all gold yielded or produced through any mining or dredging operations upon the property herein described, as said *yeil*d or production occurs, and that the Mortgagee shall apply said gold at its then value in gold coin of the United States of America, as a payment or payments in reduction of the amounts then due to the Mortgagee from the Mortgagor by reason of the above mentioned promissory notes, the said amounts being credited upon said promissory notes in the order of their maturity.

SEVENTH: That this mortgage is intended to cover not only the dredge herein described with all the appurtenances thereto, now located upon the real property hereinbefore described, but also any and all improvements and additions to said dredge and its appurtenances and to each and every and all the parts thereof, and as said additions, changes, alterations, and improvements are made they, by virtue of this mortgage, shall become a part of said dredge and shall not be removable therefrom and shall become subject to this mortgage.

IN WITNESS WHEREOF, the ALASKA MINES CORPORATION has caused these presents to be executed in triplicate by its President and its corporate seal to be hereunto affixed, attested by its Secretary, the day and year first above written.

ALASKA MINES CORPORATION,
By JAMES GAYLEY,
President.

[Corporation Seal]

Attest: WALTER S. REED,

United States of America,
Southern District of New York,
County of New York,—ss.

On this 17th day of April, 1917, before me, a Notary Public in and for the County of New York, personally appeared James Gayley and Walter S. Reed, each of whom is to me personally known, and known to me to be the persons who executed the aforegoing instrument, the said James Gayley as the President of the Alaska Mines Corporation and the said Walter S. Reed as the Secretary of the Alaska Mines Corporation, and they severally acknowledged to me that they executed the aforegoing Mortgage of both real and personal property in the name of, and as the act and deed of the Alaska Mines Corporation, and by its authorty and that they so executed the same freely and voluntarily and for the uses and purposes therein mentioned. [9]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year

in this certificate above written.

[Notarial Seal] JOHN H. GEWECKE,

Notary Public, King County, No. 23, Certificate filed in New York County. No. 44. Kings County Register's No. 8024, New York County Register's No. 8054.

Commission expires Mar. 30, 1918.

State of New York,
County of New York,—ss.

No. 42780, Series B.

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY, that John H. Gewecke, whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and therein written, was, at the time of taking such deposition or proof and acknowledgment, a Notary Public acting in and for the said County, duly commissioned and sworn, and authorized by the laws of said State to take depositions and also acknowledgments and proof of Deeds, or conveyances for land, tenements, or hereditaments in said State of New York. That there is on file in the Clerk's office of the County of New York, a certified copy of his appointment and qualification as Notary Public of the County of Kings, with his autograph signature. And further, that I am well acquainted with the handwriting of such No*rtay* Public and verily believe that the signature to said deposition, or certificate of proof or acknowledg*men* is genuine.

IN TESTIMONY WHEREOF, I have hereunto

set my hand and affixed the seal of said Court and County this 17th day of April, 1917.

[Notarial Seal] WILLIAM F. SCHNEIDER,
Clerk.

United States of America,
Southern District of New York,
County of New York,—ss.

Walter S. Reed, being first duly sworn, on oath, deposes and says: That he is Secretary of the Alaska Mines Corporation, which is a corporation and the mortgagor named in the aforegoing mortgage; that the same is made in good faith to secure the amount named therein, and without any design to hinder, delay or defraud creditors.

WALTER S. REED.

Subscribed and sworn to before me this 17th day of April, 1917.

[Notarial Seal] JOHN H. GEWECKE,
Notary Public, Kins County, No. 23, Certificate Filed in New York County No. 44, Kings County Regesters' No. 8024. New York County Register's No. 8054.

Commission expires Mch. 30, 1918.

State of New York,
County of New York,—ss.

No. 42781, Series B.

I, William F. Schneider, Clerk of the Court of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY, that John H. Gewecke, whose name is subscribed to the deposition or certifi-

cate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition or proof and acknowledgment, a Notary Public acting in and for the said County, duly commissioned and sworn, and authorized by the laws of said State to take depositions and also acknowledgments and proofs of Deeds, or conveyances for land, tenements, or hereditaments in said State of New York. That there is on file in the Clerk's office of the County of New York, a certified copy of his appointment and qualification as Notary Public of the County of Kings, with his autograph signature. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition, or certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court and County this 17 day of April, 1917.

[Notarial Seal] WM. F. SCHNEIDER,

Clerk. **[10]**

United States of America,
Southern District of New York,
County of New York,—ss.

Herbert Greenberg, being first duly sworn on oath, deposes and says: That he is the mortgagee named in the foregoing mortgage; that the same is made in good faith to secure the amount named therein and without any design to hinder, delay or defraud creditors.

HERBERT GREENBERG.

Subscribed and sworn to before me this 17th day of April, 1917.

[Notarial Seal] WM. E. CONLEY,

Notary Public in and for the County and State of New York. #155.

My commission expires March 30, 1919.

State of New York,
County of New York,—ss.

No. 42826, Series B.

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said Count*u*, the same being a Court of Record, DO HEREBY CERTIFY, that Wm. E. Conley, whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written was, at the time of taking such deposition or proof and acknowledgment, a Notary Public in and for such county, duly commissioned and sworn, and authorized by the laws of said State, to take depositions and to administer oaths to be used in any Court of said State and for general purposes; and also to take acknowledgments and proof of deeds, of conveyances for land, tenements or hereditaments in said State of New York, and further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition, or certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court and

County, the 17 day of April, 1917.

[County Seal] WM. F. SCHNEIDER,
Clerk.

SCHEDULE "A."

$5,000.00. New York, April 17, 1917.

On or before June 15th, 1917, for value received, the undersigned, ALASKA MINES CORPORATION, promises to pay to HERBERT GREENBERG or order at Empire Trust Company, 120 Broadway, in the Borough of Manhattan, City of New York, the sum of five thousand dollars ($5,000.00) with interest at the rate of six per centum per annum, payment to be made in gold coin of the United States. If suit shall be commenced for recovery of any amount due upon this note, the undersigned agrees to pay, as attorney's fees thereon, such additional sum as the Court may adjudge reasonable.

This note is one of a series of three, a*gree*gating the sum of forty thousand dollars ($40,000) all secured by a certain mortgage, executed by the undersigned, of even date herewith, and it is hereby stipulated that if this note or any of them, is not paid on the day when due, and default shall continue as provided in said mortgage all of said notes shall become due and payable.

ALASKA MINES CORPORATION.
By JAMES GAYLEY,
President.

SCHEDULE "A"-2.

$10,000.00.

On or before November 15th, 1917, for value received, the undersigned, ALASKA MINES CORPORATION, promises to pay to HERBERT GREENBERG, or order, at Empire Trust Company, 120 Broadway, in the Borough of Manhattan, City of New York, the sum of Ten Thousand Dollars ($10,000), with interest at the rate of six per centum per annum, payment to be made in gold coin of the United States. If suit shall be commenced for recovery of any amount due upon this note, the undersigned agrees to pay as attorney's fees thereon, such additional sum as the Court may adjudge reasonable. [11]

This note is one of a series of three, aggregating the sum of forty thousand dollars ($40,000) all secured by a certain mortgage, executed by the undersigned, of even date herewith, and it is hereby stipulated that if this note, or any of them, is not paid on the day when due, and default shall continue as provided in said mortgage all of said notes shall become due and payable.

ALASKA MINES CORPORATION.
By JAMES GAYLEY,
President.

Schedule "A"—#3.

$25,000.00.

On or before January 15th, 1918, for value received, the undersigned, ALASKA MINES CORPORATION promises to pay to HERBERT GREENBERG, or order, at Empire Trust Company, 120 Broadway, in the Borough of Manhattan, City of

New York, the sum of Twenty-five Thousand dollars ($25,000) with interest at the rate of six per centum per annum, payment to be made in gold coin of the United States. If suit shall be commenced for recovery of any amount due upon this note, the undersigned agrees to pay, as attorney's fees thereon such additional sum as the Court may adjudge reasonable.

This note is one of a series of three, aggregating the sum of forty thousand dollars ($40,000) all secured by a certain mortgage, executed by the undersigned, o*d* even date herewith, and it is hereby stipulated that if this note, or any of them, is not paid on the day when due, and default shall continue as provided in said mortgage, all of said notes shall become due and payable.

ALASKA MINES CORPORATION.
By JAMES GAYLEY,
President.

Recorded June 11, 1917, 9:40 A. M., at request of W. A. Gilmore.

JAMES FRAWLEY,
Recorder.

United States of America,
Territory of Alaska,
Cape Nome Precinct,—ss.

I, Hugh O'Neill, United States Commissioner and Ex-officio Recorder in and for the Cape Nome Mining and Recording Precinct, Second Division, Territory of Alaska,—

DO HEREBY CERTIFY, that I have compared the foregoing Mortgage with the original thereof, and the same is a true, and correct copy of said origi-

nal, and the whole thereof as the same appears of record in my office in Vol. 193 at page 154; that the said Mortgage was also filed as a Chattel mortgage on the 10th day of August, 1917, and is numbered 65828.

[Commissioner's Seal] HUGH O'NEILL,
U. S. Commissioner and Ex-officio Recorder. **[12]**

[Endorsed]: No. 2779. In the District Court for the District of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corporation, a Corporation, Defendant. Complaint. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Apr. 18, 1918. Thos. McGann, Clerk. By W. C. McG., Deputy. J. F. Hobbes, Attorney for Plaintiff. **[13]**

In the District Court for the District of Alaska, Second Division.

No. 2779.

HERBERT GREENBERG,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,

Defendant.

Demurrer.

Comes now the defendant above named and demurs to the complaint of the plaintiff filed herein, for the reason that said complaint does not state facts

sufficient to constitue a cause of action.

O. D. COCHRAN,
Attorney for Defendant.

Service by receipt of copy admitted May 18, 1918.

J. F. HOBBES,
Atty. for Plf.

[Endorsed]: No. 2779. In the District Court for the District of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corporation, Defendant. Demurrer. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 20, 1918. Thos. McGann, Clerk. By W. C. McG., Deputy. O. D. Cochran, Attorney for Defendant. **[14]**

287

JOURNAL OF THE DISTRICT COURT OF THE TERRITORY OF ALASKA, SECOND DIVISION.

Honorable WM. A. HOLZHEIMER, District Judge.
Saturday, June 15, 1918, 11 A. M.

* * * * * * * * *

2779.

HERBERT GREENBERG

vs.

ALASKA MINES CORPORATION.

Order Overruling Demurrer.

O. D. Cochran, on behalf of defendant, submitted demurrer without argument. Overruled, and defend-

ant granted seven days to answer.

Whereupon court adjourned until 11 A. M. Saturday, June 22, 1918. [15]

In the District Court for the District of Alaska, Second Division.

No. 2779.

HERBERT GREENBERG,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,

Defendant.

Answer.

Comes now the defendant Alaska Mines Corporation, and answering the complaint of the plaintiff, admits, denies and alleges:

I.

The defendant admits the allegations contained in paragraphs 1, 2, 3, and 4, of plaintiff's complaint.

II.

Answering paragraph 5 of said complaint, the defendant denies that the mortgage referred to in said paragraph was executed by the defendant in the presence of two witnesses who signed the same as witnesses thereto, and otherwise admits the allegations contained in said paragraph five of said complaint.

III.

The defendant admits the all*g*ations contained in

paragraph 6 of plaintiff's complaint. **[16]**

IV.

The defendant admits the allegations contained in paragraph 7 of plaintiff's complaint, except as hereinafter affirmatively alleged.

V.

Answering paragraph 8 of said complaint, the defendant alleges that on the 11th day of January, 1918, at its main office at 71 Broadway in New York City, New York, it received the following notice from the Empire Trust Company, a banking institution in the City of New York, to wit:

"New York, January 10, 1918.

Alaska Mines Corporation,
71 Broadway,
New York City.

Gentlemen:

Kindly be advised that we hold note drawn by you under date of April 17th, 1917, in the amount of $25,000, which becomes due and payable on or before January 15th, 1918.

Payment of $2,500 has been made on this note as of April 17th, 1917.

Will you kindly give this matter your attention, and oblige,

Very truly yours,
(Signed) EUGENE MILLER,
Assistant Secretary."

and except as before alleged and hereinafter admitted and alleged, defendant denies the allegations of said paragraph 8 of said complaint.

VI.

Defendant admits the allegations contained in paragraph 9 of said complaint. **[17]**

VII.

Defendant admits the allegations contained in paragraphs 10 and 11 of said complaint, except as qualified in the affirmative allegations hereinafter contained in this answer.

VIII.

The defendant denies the allegations contained in paragraph 12 of said complaint.

IX.

Defendant answering the further and separate cause of action alleged in said complaint, admits, denies and alleges:

X.

The defendant realleges, reaffirms and adopts its answer to paragraphs numbers 1 to 12, inclusive, of plaintiff's first cause of action alleged in his complaint, as hereinbefore stated.

XI.

The defendant admits the allegations contained in paragraph 2 of plaintiff's second and further cause of action alleged in said complaint.

XII.

Answering paragraphs 3 and 4 of plaintiff's second and further cause of action alleged in said complaint, defendant denies generally each and every allegation therein contained.

XIII.

The defendant admits the allegations contained in paragraphs 5, 6, and 7, of plaintiff's second and fur-

ther [18] cause of action alleged in said complaint.

XIV.

The defendant further answering plaintiff's complaint alleges that the defendant has and maintains its principal business office at 71 Broadway, New York City, State of New York; that heretofore and on the 11th day of January, 1918, one George K. McLeod served upon the defendant, by delivering to one Walter S. Reed, Secretary and Treasurer of said defendant, at the office of said defendant in New York City, a notice in words and figures as follows:

"January 11th, 1918.

Alaska Mines Corporation,
71 Broadway,
New York City.

Gentlemen:

You will please take notice, that heretofore and by a written instrument, the original of which I am showing you at the time of the delivery of this letter, Herbert Greenberg assigned to me 11/40ths of the notes and bonds and mortgages made by you and dated on or about April 17th, 1917, for $40,000.00, which said mortgage is a lien upon the following property, including any and all improvements thereon, to wit: 'Holyoke No. 2 Claim on Holyoke Creek, a tributary of Bourbon Creek, a tributary of Dry Creek, a tributary of Snake River; said mortgage covering also the hull of a dredge on said claim; all of which claim is in the Cape Nome Mining and Recording District, District of Alaska, Second Division.'

The above assignment covers 11/40th share of **[19]** the note of $25,000, due January 15th, 1918.

You are hereby requested to pay to me, as the same may become due, the above percentage, to wit, 11/40ths, of any and all bonds or notes and interest thereon secured by said mortgage aforesaid.

Yours very truly,

(Signed) GEORGE K. McLEOD."

That at the time of the serving of said notice upon the said defendant, said George K. McLeod exhibited to the said Walter S. Reed, Secretary and Treasurer of the said defendant, a written instrument signed by the plaintiff herein and the said George K. McLeod, dated on the 17th day of April, 1917, which said instrument was acknowledged by the said George K. McLeod and the said Herbert Greenberg, a copy of which said instrument is hereunto annexed marked Exhibit "A," attached to Exhibit "C" and made a part of this answer.

XV.

That by the terms of said agreement signed by the said George K. McLeod, and the said Herbert Greenberg, the ~~defendant~~ plaintiff herein, the said George K. McLeod became and now is the owner of an undivided 11/40ths interest in the identical note and mortgage set forth in plaintiff's complaint.

XVI.

That heretofore and on the 15th day of January, 1918, the said George K. McLeod commenced an action in the Supreme Court, County of New York, in the State of New York, against the said plaintiff

herein, in which said action the said George K. McLeod alleges that the plaintiff herein is indebted to him the said George K. McLeod, in the sum of **[20]** $4,657.50, which said action was commenced in the said court by the said George K. McLeod filing a complaint therein, a copy of which said complaint is hereunto attached and marked Exhibit "B" and made a part of this answer.

XVII.

That thereafter and on the said 15th day of January, 1918, said George K. McLeod, in the said Supreme Court, County of New York in the state of New York, in the said action of George K. McLeod against the ~~defendant~~ plaintiff herein, duly filed in said court an affidavit of attachment, a copy of which said affidavit of attachment is hereto attached and marked Exhibit "C" and made a part of this answer.

XVIII.

That thereafter and on the said 15th day of January, 1918, a summons in due form of law was regularly issued to the defendant Herbert Greenberg, in said action of George K. McLeod against the said Herbert Greenberg, in the said Surpreme Court of New York, County of New York, and that the said Herbert Greenberg duly appeared in said action in said Supreme Court, County of New York.

XX.

That thereafter such proceedings were had in said Supreme Court, county of New York, in said action of George K. McLeod against Herbert Greenberg, that a writ of attachment was issued out of said court

in said cause, to the sheriff of the county of New York, State of New York, commanding said sheriff to attach and safely keep so much of the property of Herbert Greenberg, the defendant, within said county of New York, as would satisfy plaintiff's demand of [21] $4,657.50, a copy of which said writ of attachment is hereto annexed and marked Exhibit "D" and made a part of this answer.

XXI.

That thereafter and on said 15th day of January, 1918, said sheriff for the county of New York, duly served upon the defendant herein, a notice of attachment, together with a copy of said writ of attachment, which said notice of attachment is hereto attached marked Exhibit "E" and made a part of this answer: that a copy of the return of said sheriff showing service of said writ of attachment upon the defendant herein, is also attached hereto and marked Exhibit "F" and made a part of this answer.

XXII.

That said Supreme Court for the county of New York State of New York, is a court of general jurisdiction, and that the said action of George K. McLeod against the said Herbert Greenberg is still pending in said court and undisposed of by said court, and that said attachment so issued out of said court and so levied against the property of said Herbert Greenberg, in hands of the defendant herein, is in full force and effect and has not been released, modified, vacated or set aside.

XXIII.

That said Supreme Court for the county of New

York, State of New York, has jurisdiction over the parties in said action of George K. McLeod against the said Herbert Greenberg, and has jurisdiction of the subject matter of said action.

XXIV.

That by reason of the foregoing facts the said George [22] K. McLeod has, or claims, an interest in the said note and mortgage sued upon in this action, and in the subject matter of this action, and is proper and necessary part in this action.

XXV.

Further answering plaintiff's complaint, defendant alleges that on the 15th day of January, 1918, upon the date the said promissory note sued upon herein became due, Mr. Walter S. Reed, Secretary and Treasurer of the defendant, tendered to the Empire Trust Company, a banking institution
its check drawn on Empire Trust Co. and payable to Empire Trust Com.,
in the city of New York, ∧ the sum of W. C. McG. Deputy
$23,512.50, in payment of the unpaid balance Clerk, 2/15/19.
due upon said date upon the promissory note sued upon herein, which said sum of $23,512.50 included all of the interest due upon said promissory note upon that day; that said Empire Trust Company, at said time, held said promissory note for collection under authority given it by the plaintiff herein; that defendant had on deposit with said Empire Trust Company at the time of said tender, and subject W. C. McG. Deputy
to its check, a sum of money in excess of Clerk, 2/15/19.
$24,000.00.

XXVI.

That at the time of tendering of said payment to

said Empire Trust Company as aforesaid, and for the purposes aforesaid, the defendant herein through its said secretary and treasurer, explained to said Empire Trust Company that a satisfaction of the mortgage securing the said promissory note was required inasmuch as the said promissory note was the last one of a series of notes secured by said mortgage, and for the additional reason of the service of notice upon said defendant by one George K. McLeod, in which said notice said George K. McLeod claimed an interest in said note and mortgage. [23]

XXVII.

That the said Empire Trust Company, acting through Myron J. Brown, its secretary, advised said Walter S. Reed, acting on behalf of this defendant, that it, the said Empire Trust Company, was unable to give any satisfaction of said mortgage, and declined to accept the tender of payment of the said note.

XXVIII.

That the defendant herein has, ever since the said 15th day of January, 1918, been able and willing to pay the amount due upon said note herein

at said Empire Trust Co. in the City of New York, State of New York,

W. C. McG. sued upon, ∧ and hereby offers to ~~and will~~

Deputy Clerk, 2/15/19.

pay at said place

~~tender into this Court,~~ the amount legally due upon said promissory note upon the said 15th day of January, 1918, less the amount which has been attached as aforesaid in the said action of George K. McLeod against Herbert Greenberg, the plaintiff herein, in the said Supreme Court for the County of New York, State of New York, as soon as said amount so attached can be ascertained or as soon as

W. C. McG. Deputy Clerk, 2/15/19.

said attachment is released, vacated or set aside that for the purpose of the payment of said promissory note the defendant has ever since said Jan. 15, 1918, and now has on deposit in said Empire Trust Co. a sum of money in excess of the amount due on said note.

WHEREFORE defendant prays that the said George K. McLeod be made a party to this action.

That the plaintiff be required to procure the release of the attachment in said action of George K. McLeod against Herbert Greenberg in the Supreme Court, County of New York, State of New York, before further prosecution of this action, and for all other and further relief to which the defendant in equity may be entitled, including costs herein incurred.

O. D. COCHRAN,
Attorney or Defendant. [24]

United States of America,
Territory of Alaska,—ss.

H. S. Thompson, being first duly sworn, deposes and says:

That he is the agent of the Alaska Mines Corporation, a corporation, the defendant herein; that he has read the foregoing answer, knows the contents thereof and the same is true as he verily believes.

H. S. THOMPSON,

Subscribed and sworn to before me this the 6th day of July, 1918.

[Notarial Seal] O. D. COCHRAN,
Notary Public in and for the Territory of Alaska.

(My commission expires on the 4th day of August, 1919.) [25]

Exhibit "B."

Supreme Court, County of New York.

GEORGE K. McLEOD,

Plaintiff,

against

HERBERT GREENBERG,

Defendant.

COMPLAINT.

The plaintiff, complaining of the defendant, alleges:

FIRST. That the plaintiff herein is a resident of the county and State of New York; that the defendant is not a resident of the county and State of New York.

SECOND. That on the 17th day of April, 1917, the Alaska Mines Corporation, a corporation organized under the laws of the State of Virginia, made, executed and delivered to the defendant, Herbert Greenberg, *it* promissory note in writing of the following tenor and content, and the following is a true copy thereof.

SCHEDULE "A"–#2.

$10,000.00 New York, April 17th, 1917.

On or before November 15th, 1917, for value received, the undersigned, Alaska Mines Corporation, promises to pay to Herbert Greenberg, or order, at Emp*rie* Trust Company, 120 Br*ao*dway, in the Borough of Manhattan, city of New York, the sum of Ten Thousand ($10,000) Dollars, [26] with interest at the rate of six per centum per annum, pay-

ment to be made in gold coin of the United States. If suit shall be commenced for recovery of any amount due upon this note, the undersigned agrees to pay, as attorney's fees thereon, such additional sum as the Court may adjudge reasonable.

This note is one of a series of three, aggregating the sum of forty thousand dollars ($40,000) all secured by a certain mortgage, executed by the undersigned, of even date herewith, and it is hereby stipulated that if this note, or any of them, is not paid on the day when due, and default shall continue as provided in said mortgage, all of said notes shall become due and payable.

ALASKA MINES CORPORATION,
By JAMES GAYLEY,
President.

That at the time of the making of said note, $1,000 was paid thereon, leaving a balance due of $9,000.

THIRD. That on the same date, for good, valuable and sufficient considerations (to wit, among other things, a release given by this plaintiff to said defendant from a certain agreement made between plaintiff and defendant dated October 9th, 1914, that in and by said agreement plaintiff was given by defendant a lien exceeding in amount $13,000 upon property owned by the defendant of a value greater tha*t* said $13,000), said defendant Greenberg, sold, assigned and transferred to this plaintiff an undivided 11/*14*ths interest in the aforesaid note, and at all times since [27] said date, plaintiff has been and now is the owner of said interest.

FOURTH. That for the same consideration, this

defendant agreed with this plaintiff that he would collect the principal and interest of said note, and upon receiving the proceeds thereof, he would pay over to this plaintiff 11/40ths of said principal and interest collected, plus a further sum equal to 9/40ths of said principal and interest collected, making in total one-half (1/2) of said principal and interest of said note collected. That on or about the 15th day of November, 1917, this defendant collected from and received from the Alaska Mines Corporation, the net principal of said $9,000 on said note and the interest thereon amounting to $315.00, making a total of $9,315.00, and thereafter and at about said time notified and stated to this plaintiff that he had so received and had in his possession said principal and interest of said note. That thereupon this plaintiff demanded of the defendant that he deliver and pay over to him one-half (½) of said principal and interest so collected and received by defendant, to wit, the sum of $4,657.50, but this defendant has at all times refused and now refused to pay over to plaintiff said sum or any part thereof, and the whole thereof remains and now is due and unpaid.

WHEREFORE, this plaintiff demands judgment against this defendant in the sum of $4,657.50, with interest [28] from the 15th day of November, 1917, and the costs and disbursements of this action.

CLARENCE S. NETTLES,

Attorney for Plaintiff.

Office & Postoffice Address: 1476 Broadway, Manhattan, New York City, N. Y.

City and County of New York,—ss.

George K. McLeod, being duly sworn, says: That he is the plaintiff in the above-entitled action and has read the aforegoing complaint and knows the contents thereof and that the same is true of his own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

GEORGE K. McLEOD.

Sworn to before me this 15th day of January, 1918.

HENRY ALEXANDER,
Commissioner of Deeds #63,
New York City.

My commission expires May 22, 1919. [29]

Exhibit "C."

Supreme Court, County of New York.

GEORGE K. McLEOD,

Plaintiff,

against

HERBERT GREENBERG,

Defendant.

AFFIDAVIT OF GEORGE K. McLEOD.

State of New York,
County of New York,—ss.

George K. McLeod, being duly sworn, says that he is the plaintiff in this action and is a resident of the county and State of New York, and resides at the corner of 59th Street and Sixth Avenue, in the Borough of Manhattan, city of New York.

That a cause of action exists in favor of the plaintiff and against the above-named defendant for the recovery of a sum of money only as damages for a breach of an express contract, other than a contract to marry, and that said cause of action arose from and is based upon the following facts and upon the facts set forth in the complaint herein which is annexed hereto and made a part hereof with the same force and effect as tho set out herein at length. That said facts are as follows:

That plaintiff has known the defendant for more than [30] five (5) years last past, both socially and in a business way, and has had business dealings with him both in New York, Seattle, and Nome, Alaska, almost continuously during said period; that the defendant is and has been the owner of certain mining interests in Alaska and has also been a dealer in goods and supplies, and plaintiff has had almost constant dealings with defendant in regard to these matters.

That in 1914, the defendant was indebted to the plaintiff upon an agreed sum exceeding $13,000, and on the 9th day of October, 1914, plaintiff and defendant entered into an agreement which was duly recorded in the Cape Nome Mining and Recording District, District of Alaska, Second Division. That plaintiff has not, at this time, said agreement, but can state of his own knowledge the contents thereof, to wit, that thereby the defendant sold and assigned to the plaintiff, Holyoke No. 2 Claim on Holyoke Creek hereinafter referred to, and the dredge hereinafter referred to as collateral security for the said

sum owing by defendant to the plaintiff. That on the 17th day of April, 1917, said sum exceeding $13,000 was still owing by defendant to plaintiff and said collateral security agreement was still in full force. It cannot, however, be produced before this Court within the time necessary to make any warrant of attachment of advantage.

That in April, 1917, the defendant came to New York and stated to plaintiff that the Alaska Mines Corporation, a Virginia corporation, desired to purchase a certain mining claim known as Holyoke No. 2 Claim on Holyoke Creek, a tributary of Bourbon Creek, a tributary of Dry Creek, a tributary of Snake River, and the hull of a dredge then on said claim, [31] and that he desired plaintiff to release the aforementioned collateral security agreement and accept a new agreement in its place. That said defendant advised with the plaintiff constantly regarding his conferences with the Alaska Mines Corporation in regard to the above matter.

That after negotiations, said Alaska Mines Corporation made and executed its three (3) certain promissory notes, each in the following form and made on the following date for the amounts following and payable at the following times:

April 17, 1917, Amount $5,000. Payable June 15th, 1917.

April 17, 1917, Amount $10,000. Payable November 15th, 1917.

April 17, 1917, Amounts $25,000. Payable January 15th, 1918.

making the aggregate payment of Forty Thousand

($40,000) Dollars; that said form of each note is as follows:

SCHEDULE "A."

$5,000.00. New York, April 17, 1917.

On or before June 15th, 1917, for value received, the undersigned, Alaska Mines Corporation, promises to pay to Herbert Greenberg or order, at Empire Trust Company, 120 Broadway, in the Borough of Manhattan, city of New York the sum of Five Thousand Dollars ($5,000), with interest at the rate of six per centum per annum, payment to be made in gold coin of the United States. If suit shall be commenced for recovery of any amount due upon this note, the undersigned agrees to pay, as attorneys' fees thereon, such *addition* sum as the Court may adjudge reasonable.

This note is one of a series of three, aggregating the sum of Forty Thousand Dollars ($40,000), all secured by a certain mortgage, executed by the undersigned, of even [32] date herewith, and it is hereby stipulated that if this note, or any of them, is not paid on the day when due, and default shall continue as provided in said mortgage, all of said notes shall become due and payable.

ALASKA MINES CORPORATION.
By JAMES GAYLEY,
President.

SCHEDULE "A"-#2.

$10,000.00. New York, April 17th, 1917.

On or before November 15th, 1917, for value received, the undersigned, Alaska Mines Corporation, promises to pay to Herbert Greenberg, or order, at

Empire Trust Company, 120 Broadway, in the Borough of Manhattan, city of New York, the sum of Ten thousand dollars ($10,000) with interest at the rate of six per centum per annum, payment to be made in gold coin of the United States. If suit shall be commenced for recovery of any amount due upon this note, the undersigned agrees to pay, as attorneys' fees thereon, such additional sum as the Court may adjudge reasonable.

This note is one of a series of three, aggregating the sum of Forty Thousand Dollars ($40,000), all secured by a certain mortgage, executed by the undersigned, of even date herewith, and it is hereby stipulated that if this note, or any of them, is not paid on the day when due, and default shall continue as provided in said mortgage, all of said notes shall become due and payable.

ALASKA MINES CORPORATION.
By JAMES GAYLEY,
President.

SCHEDULE "A"-#3. [33]

$25,000.00. New York, April 17, 1917.

On or before January 15th, 1918, for value received, the undersigned, Alaska Mines Corporation promises to pay to Herbert Greenberg, or order, at Empire Trust Company, 120 Broadway, in the Borough of Manhattan, City of New York, the sum of Twenty-five Thousand Dollars ($25,000), with interest at the rate of six per centum per annum, payment to be made in gold coin of the United States. If suit shall be commenced for recovery of any amount due upon this note, the undersigned agrees to pay, as

attorneys' fees thereon, such additional sum as the Court may adjudge reasonable.

This note is one of a series of three, aggregating the sum of Forty Thousand Dollars ($40,000), all secured by a certain mortgage, executed by the undersigned, of even date herewith, and it is hereby stipulated that if this note, or any of them, is not paid on the day when due, and default shall continue as provided in said mortgage, all of said notes shall become due and payable.

ALASKA MINES CORPORATION.
By JAMES GAYLEY,
President.

That at the same time, said Alaska Mines Corporation, to secure the payment of said notes aggregating Forty Thousand ($40,000) Dollars, sold assigned and transferred to Herbert Greenberg, the defendant, an*d* undivided fifty-one per cent (51%) interest in said Holyoke No. 2 Claim aforesaid, and in and to said dredge hull located on said claim.

That at the same time, and on April 17th, 1917, as [34] said notes and transfer was made between said Alaska Mines Corporation to this defendant, this plaintiff and this defendant, for a good valuable and sufficient consideration made, entered into and mutually delivered a certain agreement on said date aforesaid, a copy of which is hereto annexed and made a part hereof as tho set out herein at length. That the original of this agreement has been mailed to a Recording office in Alaska for record, but plaintiff knows and has compared the attached copy with said original and knows that it is a true copy thereof.

That the claim denominated "Holyoke No. 2 Claim on Holyoke Creek, a tributary of Bourbon Creek, a tributary of Dry Creek, a tributary of Snake River and the hull of a dredge on said Claim" referred to in said agreement between said corporation and this defendant and referred to in the agreement attached hereto between plaintiff and defendant, is the same claim and the same dredge and the three notes aggregating Forty Thousand ($40,000) Dollars hereinbefore referred to as made between Alaska Mines Corporation to the defendant is the bond in the sum of $40,000, mentioned and described in the agreement between plaintiff and defendant, and are the bond and notes referred to in that paragraph of the agreement between plaintiff and defendant wherein Greenberg agrees to receive any sums on account thereof and pay over one-half (½) to this plaintiff. Both Exhibit "A" and Exhibit "B" refer to the same notes and mortgage.

That at the time of the making and delivery of said note dated April 17th, 1917, the principal sum of which was $10,000 and which was due on or before November 15th, 1917, [35] the defendant gave to the Alaska Mines Corporation a credit of $1,000 thereon, leaving a balance due of $9,000. That on or about the 15th day of November, 1917, the defendant presented said note for $10,000, for payment, and the Alaska Mines Corporation paid the principal and interest of said note to the said defendant Greenberg and paid him the sum of $9,315, and the whole of the principal of said note and interest was received by the defendant Greenberg and said sum

of $9,315.00 on account of said note was received by said Greenberg. And said Greenberg so stated and told the plaintiff, and plaintiff has also been so advised by the Alaska Mines Corporation and by its authorized representatives Mr. Walter S. Reed and Mr. E. E. Powell. That after the receipt of said sum by the defendant from the Alaska Mines Corporation, the plaintiff requested the defendant to pay to him one-half (½) of said amount, or the sum of $4,657.50, but the said defendant, Greenberg, refused and failed, and has at all times failed and refused to pay the plaintiff said one-half (½) or any part of the principal or interest of said note, and has failed and refused to pay the plaintiff any part of said $9,315.00 received by him, and now so refused, and the whole of said sum of $4,657.50, with interest from the 15th day of November, 1917, is due and owing from the defendant to this plaintiff.

That all of the above facts are as aforesaid within the personal knowledge of the plaintiff, plaintiff having been present at many of the meetings and negotiations leading up to the above transaction, and having conferred with the defendant regarding them and also regarding the collection and payment [36] of the aforementioned note.

That the plaintiff in this action is entitled to recovery from the defendant on the aforesaid cause of action, said sum of $4,657.50, with interest from the 15th day of November, 1917, over and above all counterclaims known to plaintiff.

That the defendant is a natural person and is not

a resident of the State of New York, but resides in the Town of Nome, in the Territory of Alaska.

That, as aforesaid, plaintiff has had almost continuous business dealings with the defendant in said Territory for more than five years last past, and had conferred with the defendant both at his place of business in Alaska and at his abode, and personally knows that he lives and resides in said town of Nome, and defendant has told him many times that he was and is a resident of said Territory and of said town. That at the time of his dealings with the Alaska Corporation, the defendant, to the personal knowledge of the plaintiff, described himself as of the town of Nome, Alaska.

That plaintiff has commenced this action to recover the sum of $4,657.50, with interest from November 15th, 1917, as aforesaid, on said cause of action, and the summons herein, a copy of which is hereto annexed, has been duly issued and the warrant herein is asked for to accompany the summons.

That no previous application has been made for a warrant of attachment herein. That the agreement hereto annexed between plaintiff and defendant and heretofore referred to in this affidavit is marked and denominated Exhibit [37] "A," and the agreement and mortgage between defendant and Alaska Mines Corporation is marked and denominated exhibit "B."

GEORGE K. McLEOD.

Sworn to before me this 15th day of January, 1918.

HENRY ALEXANDER,

Commissioner of Deeds, #63, New York City.

My commission expires May 22d 1919. [38]

EXHIBIT "A."

MEMORANDUM OF AGREEMENT BETWEEN GEORGE K. McLEOD AND HERBERT GREENBERG.

The consideration of this agreement is the sum of One Dollar paid by each party hereto to the other, and other good and valuable considerations the receipt whereof is hereby acknowledged.

The benefits of this agreement shall enure to, and it shall be binding upon, the executors, administrators, personal representatives and assigns of the respective parties.

It is hereby mutually agreed, that the agreement between these parties dated the 9th day of October, 1914, and acknowledged before William A. Gilmore, Notary Public and duly filed for record in the Cape Nome Mining and *Record-* District, District of Alaska, Second Division, is cancelled, and that this instrument is evidence of such cancellation.

The Alaska Mines Corporation has this day made and executed to Herbert Greenberg its certain bond and mortgage in the sum of Forty Thousand ($40,-000) Dollars, which said mortgage is a lien upon the following described Real and Personal property situate in the above-mentioned District; Holyoke No. 2 Claim on Holyoke Creek, a tributary of Bourbon Creek, a tributary of Dry Creek, a tributary of Snake River; the hull of a dredge on said claim,

which said mortgage will be recorded with the officer of the above-mentioned recording District as soon as possible; that said Greenberg has also given an option to the Alaska Mines Corporation on other properties mentioned in said agreement of the 9th day of October, 1914, and regarding the aforesaid bond and mortgage and option, the parties hereto agree as follows: [39]

Herbert Greenberg hereby assigns to George K. McLeod, an*d* undivided eleven fortieths (11/40) interest in the aforesaid bond and mortgage of the Alaska Mines Corporation.

Said Greenberg hereby agrees to receive any sums paid on account of the or notes of said Corporation, and said mortgages, as trustee, and to pay over to said McLeod one-half thereof, until the sum of Eleven Thousand ($11,000) Dollars is paid thereout to said McLeod, and if the said Greenberg received interest, he is also to pay to said McLeod interest on said Eleven Thousand ($11,000) Dollars, or any balance remaining due at any time.

The parties agree that when said McLeod shall have received said Eleven Thousand ($11,000) with interest i*n* any, he will reconvey and release to said Greenberg said Eleven-fortieths (11/40) of said bond and mortgage just conveyed to him, and revest in said Greenberg all interest in said mortgage conveyed to him.

If the said Alaska Mines Corporation shall not pay the amounts due on its bond and mortgage, the following provision shall apply:

The property shall be foreclosed, and if sold to an

outsider, the proceeds shall be first applied to the payment of any balance remaining due on the Eleven Thousand ($11,000) Dollars payable to said McLeod, with interest if any.

If the property shall be bought in either by said Greenberg or anyone in his interest, then the present lien given by the aforesaid agreement of October 9th, 1914, shall [40] be revived in favor of the said McLeod to the extent of any unpaid balance then due him, and the said Greenberg will execute, in proper form for recording, a proper instrument reviving the aforesaid lien as a first lien as it is at this time, or if he shall fail to do so or cannot do so, then he, personally, hereby agrees to pay to the said McLeod any balance then due and unpaid on account of said Eleven Thousand ($11,000) Dollars.

If the Alaska Mines Corporation shall exercise the option hereinbefore referred to, and any sum shall then remain payable to said McLeod on account of said Eleven Thousand ($11,000) Dollars, said Greenberg agrees to hold any payment received by him under said option as trustee to pay thereout one-half thereof to the said McLeod, until the whole of said balance due on said Eleven Thousand ($11,000) Dollars is paid.

And if said option is not exercised, and if, through any mortgage foreclosure, there shall not have been realized sufficient to pay to said McLeod the balance of any amount due him on account of said Eleven Thousand ($11,000) Dollars, then, and in that event, the said McLeod is hereby given a first lien upon any and all properties mentioned in said option for any

balance due of said Eleven Thousand ($11,000) Dollars and interest if any, in the same manner and form as said lien is stated in said agreement of October 9th, 1914, and said Greenberg agrees to execute an instrument, proper in form, to be recorded, creating and reviving said lien, and in default thereof, at the option of said McLeod, said Greenberg agrees to pay to said McLeod any balance then due and owing to him on account of said Eleven Thousand ($11,000) Dollars [41] and interest, if any.

IN WITNESS WHEREOF, the parties hereto have signed and sealed this instrument on this 17th day of April, 1917.

GEORGE K. McLEOD. (Seal)
HERBERT GREENBERG. (Seal)

County of New York,—ss.

On this 17th day of April, 1917, before me personally came George K. McLeod, to me known and known to me to be the person described in and who executed the aforegoing instrument, and he acknowledged to me that he executed the same.

CHARLES B. WILLARD,

Notary Public, Residing in Kings Co., Kings Co., No. 126, Reg. No. 8114 Cert. Filed in N. Y. Co., 396 N. Y. County, Reg. No. 8281.

Commission expires March 30, 1918.

County of New York,—ss.

'On this 17th day of April, 1917, before me personally came Herbert Greenberg, to be known and known to *be* to be the person described in and who executed the aforegoing instrument, and he personally ac-

knowledged to me that he *eee*cuted the same.

CHARLES B. WILLARD,

Notary Public, Residing in Kings Co., Kings Co., No. 126, Reg. No. 8114. Cert. Filed in N. Y. Co., No. 396, N. Y. County, Reg. No. 8281.

Commission expires March 30, 1918. [42]

EXHIBIT "B."

THIS *ID*ENTURE OF MORTGAGE made and entered into this 17th day of April, 1917, between ALASKA MINES CORPORATION, a corporation organized and existing under and pursuant to the laws of the Commonwealth of Virginia, party of the first part (hereinafter referred to as the "Mortgagor") and Herbert Greenberg, of Nome, Alaska, party of the second part (hereinafter referred to as the "Mortgagee"), WITNESSETH:

The mortgagor, for and in consideration of the sum of One Dollar ($1.00) and other valuable considerations to it in hand paid by the Mortgagee, the receipt whereof is hereby acknowledged, and in order to secure the payment to the Mortgagee, of the sum of Forty thousand dollars ($40,000) as evidenced by three promissory notes in writing, aggregating said sum, made and executed and delivered by the Mortgagor to the Mortgagee, all bearing even date herewith, copies of which are hereto annexed, marked "Schedule A," does hereby grant, bargain, sell and convey unto the Mortgagee, his heirs executors, administrators and assigns, all of the following described real and personal property situate in the Cape Nome Mining District, Seward Peninsula, Territory of Alaska;

An undivided fifty-one *pre*cent, interest in the Holyoke No. 2 Claim on Holyoke Creek, a tributary of Bourbon Creek, a tributary of Dry Creek, a tributary of Snake River, together with a dredge hull and all timbers, st*oo*l, iron, bolts and appliances purchased for the same, situated on said The Holyoke No. 2 Claim on Holyoke Creek; or stored for said hull, and wherever situated.

TO HAVE AND TO HOLD the above granted premises unto [43] the Mortgagee, his heirs, executors, administrators and assigns forever. The above property being the same property conveyed and transferred by the Mortgagee to the Mortgagor by deed and bill of sale bearing even date herewith, this mortgage and the notes secured hereby being given to secure payment of a part or portion of the purchase money consideration paid for said property. Provided always that if the mortgagor or its successors and assigns shall pay unto the Mortgagee or his heirs, executors, administrators and assigns, the said sum of money mentioned in the aforesaid promissory notes and the interest thereon, at the time and in the manner mentioned in the said promissory notes, then and in that event these presents and the estate hereby granted shall cease, determine and become void.

And the parties hereto covenant and agree as follows:

FIRST. That the Mortgagor will pay the indebtedness as provided in this mortgage, and if default be made in the payment of any note, and such default shall continue for a period of sixty days after notice and demand in writing, then and in such event all of

said notes immediately and forthwith shall become due and payable, and it shall be lawful for the Mortgagee, his heirs, executors, administrators and assigns, to take immediate possession of all the personal property hereinbefore conveyed and transferred, and sell the same at public sale in the manner provided by la*y* and apply the proceeds, as far as may be, to the payment of the amount then due, together with the costs and expenses of sale, including [44] all reasonable expenses of taking possession of, keeping and caring for said personal property. The United States Marshal of the Second District of the District of Alaska is hereby authorized to execute the power of sale herein granted to said Mortgage, his heirs, executors, administrators and assigns, or in case of such default and its continuance as aforesaid, the Mortgagee may proceed to foreclose this mortgage by suit at law in any court of competent jurisdiction. Notwithstanding this mortgage, the real and personal property hereinbefore mentioned *my* remain in possession of the Mortgagor until default and its continuance as aforesaid.

SECOND. That if default be made in the payment of any of said notes when due, and said default shall continue for a period of sixty days after notice and demand in writing, or if default shall be made in the payment of any interest, taxes, or assessments, and such default shall continue for a period of sixty days after like notice and demand, then and in such event all of said notes immediately and forthwith shall become due and payable and the Mortgagee shall have power to sell the realty herein described accord-

ing to law, and that upon such default, and its continuance as aforesaid, the Mortgagee shall have the right forthwith to enter upon the Mortgaged premises, receive all of the proceeds, rents, issues and profits therefrom and apply the same, after payment of all necessary charges and expenses, on account of the amount hereby secured, and said proceeds, rents, issues and profits are, in the event of such default, and its continuance as aforesaid, hereby assigned to the Mortgagee.

THIRD. That the Mortgagee shall have the right upon any such default and the continuance of such default as **[45]** aforesaid, and upon the commencement of any proceedings *be* foreclose this mortgage, to apply for and shall be entitled, as a matter of right without consideration of the value of the mortgaged premises as security for amounts due the mortgagee or of the solvency of any person or persons liable for the payment of such amounts, to the appointment of a receiver of the rents, issues and profits or other proceeds from the real property above mortgaged.

FOURTH. That the Mortgagee may, at his option, pay any lawful tax, charge or assessment upon said property and said payment together with expenses incurred in connection therewith shall become part of the principal sum due from the Mortgagor to the Mortgagee;

FIFTH. That any notice required herein to be given by the Mortgagee to the Mortgagor may be either personally served or be served by mail through the United States postoffice by registered letter ad-

dressed to the Mortgagor at its principal place of business in the Territory of Alaska or its office in the Borough of Manhattan, City of New York, or it may be served upon the agent of the Mortgagor appointed in Alaska pursuant to statute.

SIXTH. That the Mortgagor shall pay over to the Mortgagee fifteen per cent, of all gold yielded or produced through any mining or dredging operations upon the property herein described, as said yield or production occurs, and that the Mortgagee shall apply said gold at its then value in gold coin of the United States of America as a payment or payments in reduction of the amounts then due to the Mortgagee from the Mortgagor by reason of the above mentioned promissory [46] notes, the said amounts being credited upon said promissory notes in the order of their maturity.

SEVENTH. That this mortgage is intended to cover not only the dredge herein described with all the appurtenances thereto, now located upon the real property hereinbefore described, but also any and all improvements and additions to said dredge and its appurtenances and to each and every and all of the parts thereof, and as said additions, changes, alterations and improvements are made they, by virtue of this mortgage shall become a part of said dredge and shall not be removable therefrom and shall become subject to this mortgage.

IN WITNESS WHEREOF, the ALASKA MINES CORPORATION has caused these presents to be executed in triplicate by its President and its corporate seal to be hereunto affixed, attested by its

Secretary, the day and year first above written.

ALASKA MINES CORPORATION,
By JAMES GAYLEY,
President.

[Corporate Seal]

Attest: WALTER S. REED,
Secretary.

United States of America,
Southern District of New York,
County of New York,—ss.

On this 17th day of April, 1917, before me, a Notary Public in and for the County of New York, personally appeared James Gayley and Walter S. Reed, each of whom is to me personally known, and known to me to be the persons who executed the aforegoing instrument, the said James Gayley [47] as the said President of the Alaska Mines Corporation, and the said Walter S. Reed as the Secretary of the Alaska Mines Corporation, and they severally acknowledged to me that they executed the aforegoing mortgage of both real and personal property in the name of, and as the act and deed of the Alaska Mines Corporation, and by its authority, and that they so executed the same freely and voluntarily and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

[Seal] JOHN H. GEWOCKE,

Notary Public, Kings County No. 23. Certificate Filed in New York Co. No. 44, Kings County Register's No. 8024.

Commission expires Mch. 30, 1918.

United States of America,
Southern District of New York,
County of New York,—ss.

Walter S. Reed, being first duly sworn, on oath, deposes and says:

That he is Secretary of the Alaska Mines Corporation, which is a corporation and the Mortgagor named in the aforegoing mortgage; that the same is made in good faith to secure the amount named therein, and without any design to hinder, delay or defraud creditors.

WALTER S. REED.

Subscribed and sworn to before me this 17th day of April, 1917. [48]

[Seal] JOHN H. GEWECKE,

Notary Public, Kings County No. 23. Certificate Filed in New York County No. 44, Kings County Regist*e's* No. 8024. New York County Register's No. 8054.

Commission expires Mch. 30, 1918.

United States of America,
Southern District of New York,
County of New York,—ss.

Herbert Greenberg, being first duly sworn on oath, deposes and says:

That he is the Mortgagee named in the foregoing mortgage; that the same is made in good faith to secure the amount named therein and without any design to hinder, delay or defraud creditors.

HERBERT GREENBERG.

Subscribed and sworn to before me this 17th day of April, 1917.

[Seal] WM. E. CONLEY,

Notary Public in and for the County and State of New York #155.

My commission expires March 30, 1919. [49]

Supreme Court of New York, County of New York.

GEORGE K. McLEOD,

Plaintiff,

vs.

HERBERT GREENBERG,

Defendant.

To the Above-named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated January 15th, 1918.

CLARENCE S. NETTLES,

Plaintiff's Attorney.

Office & P. O. Address, No. 1476 Broadway, Manhattan, New York City. [50]

Exhibit "D."

The People of the State of New York to the Sheriff of the County of New York, GREETING:

WHEREAS, an application has been made to the

Judge granting this warrant by George K. McLeod, plaintiff, for a warrant of attachment against the property of Herbert Greenberg, defendant, in an action in the Supreme Court of the State of New York in and for the County of New York, and it appearing by affidavit to the satisfaction of the Judge granting this warrant that one of the causes of action specified in Section 635 of the Code of Civil Procedure exists against the defendant to recover a sum of money only over and above all counterclaims known to the plaintiff, to wit, the sum of Four Thousand and Six Hundred Fifty-seven Dollars & 50/100 ($4,657.50), with interest from the 15th day of November, 1917, for breach of an express contract in failing to pay over to the plaintiff monies received by the defendant and agreed by him to be paid over to the plaintiff, and the affidavit showing that the defendant is a natural person and not a resident of the state of New York, and the plaintiff having also given the undertaking required by law.

NOW, YOU ARE HEREBY COMMANDED to attach and safely keep so much of the property within your County which the defendant, Herbert Greenberg, has, or which he may have at any time before final judgment in the action, as will satisfy plaintiff's demand of Four Thousand Six Hundred Fifty-seven Dollars & 50/100 ($4,657.50), with interest from November 15th, 1917, together with costs and expenses, and that you proceed hereon in the manner required of you by law. **[51]**

WITNESS, Hon. PETER A. HENDRICK, a Justice of the Su*rprme* Court of the State of New

York, in and for the county of New York, at the county courthouse, City Hall Park, Borough of Manhattan, city of New York, on the 15th day of January, 1918.

PETER A. HENDRICK,

Judge of the Supreme Court of the State of New York.

CLARENCE S. NETTLES,

Plaintiff's Attorney, 1476 Broadway, Manhattan, New York City. [52]

Exhibit "E."

SHERIFF'S OFFICE, NEW YORK COUNTY.

I HEREBY CERTIFY the within to be a true copy of the original Warrant of Attachment, as issued to me in the within mentioned action, and that the attachment of which the within is a copy is now in my hands, and that by it I am commended to attach all estate, real and personal, including money and bank-notes, bonds, promissory notes and other instruments for the payment of money, as well as any and all interests in any partnership, of the defendant, and of the defendants, and each of *the*, as stated in said copy herewith served upon you, to which copy you are hereby referred for the name or names of the defendant or defendants whose property is attached within my county (except articles exempt from execution), and to take into my custody all books of account, vouchers, and paper relating to the property, debts, credits and effects, of said defendant, and of said defendants, and of each of them, together with all evidences of title to real estate, and that all such property, debts, credits and effects, and

all rights and shares of stock, with all interests and profits thereon, and all dividends thereon, or therefrom, of the said defendant and of said defendants and of each of them, now in your possession or under your control, are, and those which may come into your possession or under your control will be, liable to said warrant of attachment, and are hereby attached by me, and you are hereby required to deliver all such moneys, bank-notes, bonds, promissory [53] notes and other instruments for the payment of money, books, vouchers, papers, debts, credits, effects, evidences of title to real estate, shares of stock, interests, profits and dividends thereon, and all property *cc*pable of manual delivery, into my custody without delay. And I hereby require you to furnish me with a certificate as required in that behalf by the Code of Civil Procedure, of any *t*ights, shares, debts, or other prop*et*y of said defendant, and of said defendants, and each of *the*, incapable of manual delivery. And in DEFAULT hereof you will be liable to the EXAMINATION AND ATTACHMENT in such cases provided by law. Code of Civil Procedure, Secs. 650, 651.

TAKE NOTICE that, after service hereof upon you, no demand or property hereby attached can be lawfully released, by order or otherwise, except through the sheriff and by his direction. Code of Civil Procedure, Sec. 709, L. 1892, Ch. 418.

Dated, New York, the 15th day of January, 1918.

DAVID H. KNOTT,
Sheriff of the County of New York.
Louis Ressler,
Deputy Sheriff. [54]

Exhibit "F."

Supreme Court, New York County.

GEORGE K. McLEOD,

Plaintiff,

against

HERBERT GREENBERG,

Defendant.

I served a copy of the warrant of attachment, on Mr. Paul H. Hudson, Assistant Secretary of the Empire Trust Company, on January 15th, 1918, at 3:40 P. M., at 120 Broadway, and on Mr. Ellis E. Powell, General Manager of the Alaska Mines Corporation, on January 15th, 1918, at 3:50 P. M., at 71 Broadway, and on John J. Broderick, Jr., Treasurer of the Hudson Trust Company, on January 24th, 1918, at 10 A. M., at Broadway and 39th Street, New York City, and demanded a certificate.

LOUIS RESSLER,
Deputy Sheriff.

[Endorsed]: No. 2779. In the District Court for the District of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corporation, Defendant. Answer. Answer Amended by Interlineation by the Clerk, Feb. 15, 1919. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 20, 1918. Thos. McGann, Clerk. By ———, Deputy. D. O. D. Cochran, Attorney for Defendant. **[55]**

JOURNAL OF THE DISTRICT COURT OF THE TERRITORY OF ALASKA, SECOND DIVISION.

Honorable WM. A. HOLZHEIMER, District Judge.

Saturday, February 15, 1919—11 A. M.

* * * * * * * * *

2779.

HERBERT GREENBERG

vs.

ALASKA MINES CORPORATION.

Minutes of Court—February 15, 1919—Order Granting Leave to Amend Original Answer by Interlineations by Clerk.

Plaintiff represented by counsel, Hugh O'Neill. Defendant represented by O. D. Cochran.

On motion of O. D. Cochran, it was ordered that leave be granted to amend the original answer by interlineation, by the Clerk as follows: On page #8 inserting the following words: "its check drawn on Empire Trust Company and payable to Empire Trust Company." Also, "that defendant had on deposit with said Empire Trust Company at the time of said tender, and subject to its check, a sum of money in excess of $24,000.00"; on page #9 inserting the following words: "at said Empire Trust Company in the City of New York, State of New York," and striking out the words, "and will tender into this Court"; and inserting in their place the following words, "pay at said place"; further, on page #9 inserting the following words; "that for the purpose

of the payment of said promissory note, the defendant has ever since said January 15, 1918, and now has on deposit in said Empire Trust Company a sum of money in excess of the amount due on said note." Hugh O'Neill announced that defendant could not plead a tender without depositing the money into this court; also that plaintiff does not waive defendant's failure to deposit.

* * * * * * * * *

Whereupon Court adjourned until 2 P. M., Wednesday, February 19, 1919. [56]

In the District Court for the Territory of Alaska, Second Division.

No. 2779.

HERBERT GREENBERG,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,

Defendant.

Amended Reply.

Comes now the plaintiff and for reply to the answer of defendant admits, denies and alleges as follows:

I.

Replying to paragraph XIV of defendant's answer, plaintiff admits that the defendant has and maintains its principal business office at 71 Broadway, New York, and that on the 11th day of January,

1918, one George K. McLeod served upon the defendant at its said office the notice therein set forth, and at the same time and place exhibited the instrument therein described.

II.

Replying to paragraph XV of said answer, plaintiff denies each and every allegation, matter and thing therein contained, and the whole thereof.

III.

Replying to paragraphs XVI, XVII, XVIII, XX and XXI of defendant's answer, plaintiff admits each and every allegation therein contained.

IV.

Replying to paragraph XXII of defendant's answer, plaintiff admits that said Supreme Court for the county of New York, State of New York, is a court of general jurisdiction, and that the said action therein referred to is still pending in said court and undisposed of by said Court, but denies that said attachment and garnishment levied against the property of this plaintiff in said action is in full force and effect, and denies that the same, has not been released, modified, **[57]** vacated or set aside, but alleges that said attachment and garnishment in said paragraph referred to has been released and vacated by order of said court and is no longer in effect or force.

V.

Replying to paragraph XXIII of defendant's answer, plaintiff admits the same.

VI.

Replying to paragraph XXIV of the defendant's

answer, plaintiff denies that said George K. McLeod has any interest in the said note and mortgage sued upon in this action, and denies that the said George K. McLeod is a proper or necessary party to this action.

VII.

Replying to paragraphs XXV, XXVI and XXVII of defendant's answer, plaintiff denies each and every allegation, matter and thing therein contained, except that he admits and alleges that the Empire Trust Company of New York held said note on January 15, 1918, for collection as his agent, and on said date presented said note for payment to the defendant, and offered to cancel and surrender said note upon receipt of payment of its face value on said date, that at said time and place said defendant offered said Empire Trust Company the defendant's uncertified check for the amount mentioned in paragraph XXV of said answer of defendant, conditioned upon a demand for a written release of the mortgage sued upon herein to be executed by this plaintiff and one George K. McLeod, and said defendant refused to deliver said check or to pay said note under any other conditions, and plaintiff specifically denies that said defendant ever made any lawful tender to plaintiff of payment of said note at said time and place or elsewhere or at all.

And further replying to said paragraphs of said answer plaintiff alleges that he is now and always has been ready, willing and able to satisfy said mortgage as of record upon the payment of the amount due thereon. [58]

Further replying to said paragraphs plaintiff alleges that the defendant failed, refused and neglected, and still fails, refuses and neglects to deposit into this court the sum of Twenty-three Thousand Five Hundred and Twelve and 50/100 Dollars ($23,512.50), as alleged in paragraph XXV of its answer, or any other sum, in payment of the note and mortgage sued upon herein. That said sum mentioned in said paragraph XXV is not now, or never has been, available to the plaintiff herein.

VIII.

Replying to paragraph XXVIII of the defendant's answer, plaintiff denies each and every allegation, matter and thing therein contained, and the whole thereof.

WHEREFORE plaintiff having fully replied to the answer of the defendant prays for the relief demanded in his complaint.

HUGH O'NEILL,
Attorney for Plaintiff.

Territory of Alaska,
Second Division,—ss.

Hugh O'Neill, being first duly sworn, deposes and says: That I am the attorney for the plaintiff in the above-entitled action. That I have read the foregoing amended reply, know the contents thereof and that the same is true, as I verily believe. That the plaintiff herein is at present without the jurisdiction of the Territory of Alaska, to wit, in the State of New York, and that this verification is made by affiant for this reason.

HUGH O'NEILL.

Subscribed and sworn to before me this 15th day of February, 1919.

[Notarial Seal] L. E. WEITH,

Notary Public for the Territory of Alaska, Residing at Nome.

My commission expires Nov. 14, 1921.

[Endorsed]: No. 2779. In the District Court for the Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corporation, a Corporation, Defendant. Amended Reply. Filed in the Office of the Clerk of the District Court of the Territory of Alaska, Second Division, at Nome. Feb. 15, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy. Hugh O'Neill, Attorney for Plaintiff. [59]

In the District Court for the Territory of Alaska, Second Division.

No. 2779.

HERBERT GREENBERG,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,

Defendant.

Findings of Fact and Conclusions of Law.

This cause coming on regularly for trial before the Court on this, the 21st day of February, 1919, the plaintiff, Herbert Greenberg, appearing by his attorney, Hugh O'Neill, Esq., and the defendant, Alaska

Mines Corporation, a corporation, appearing by its attorney, O. D. Cochran, Esq., and the Court now having heard the testimony, both oral and documentary, offered on behalf of the plaintiff, and the defendant not having offered any testimony, and the Court now being fully advised in the premises, does make the following

FINDINGS OF FACT:

I.

The Court finds that the said defendant, Alaska Mines Corporation, is a corporation organized and existing under the laws of the State of Virginia, and is authorized to, and is, transacting business in the Territory of Alaska.

II.

The Court finds that heretofore, to wit, on the 17th day of April, 1917, for value received, the defendant corporation by James Gayley, its president, thereunto duly authorized, made, executed and delivered to Herbert Greenberg, plaintiff herein, its series of three certain promissory notes in words and figures following, to wit: **[60]**

SCHEDULE "A."

$5,000.00. New York, April 17, 1917.

On or before June 15th, 1917, for value received, the undersigned, Alaska Mines Corporation, promises to pay to Herbert Greenberg or order, at Empire Trust Company, 120 Broadway, in the Borough of Manhattan, City of New York, the sum of five thousand dollars ($5,000.00) with interest at the rate of six per centum per annum, payment to be

made in gold coin of the United States. If suit shall be commenced for recovery of any amount due upon this note, the undersigned agrees to pay, as attorney's fees thereon, such additional sum as the Court may adjudge reasonable.

This note is one of a series of three, aggregating the sum of forty thousand dollars ($40,000), all secured by a certain mortgage executed by the undersigned, of even date herewith, and it is hereby stipulated that if this note or any of them, is not paid on the day when due, and default shall continue as provided in said mortgage all of said notes shall become due and payable.

ALASKA MINES CORPORATION.
By JAMES GAYLEY,
President.

SCHEDULE "A-2."

$10,000.00 New York, April 17, 1917.

On or before November 15th, 1917, for value received, the undersigned, Alaska Mines Corporation, promises to pay to Herbert Greenberg or order, at Empire Trust Company, 120 Broadway, in the Borough of Manhattan, City of New York, the sum of Ten Thousand Dollars ($10,000) with interest at the rate of six per centum per annum, payment to be made in gold coin of the United States. If suit shall be commenced for recovery of any amount due upon this note, the undersigned agrees to pay, as attorney's fees thereon, such additional sum as the Court may adjudge reasonable.

This note is one of a series of three, aggregating the sum of forty thousand dollars ($40,000), all

secured by a certain mortgage executed by the undersigned, of even date herewith, and it is hereby stipulated that if this note or any of them, is not paid on the day when due, and default shall continue as provided in said mortgage all of said notes shall become due and payable.

ALASKA MINES CORPORATION.
By JAMES GAYLEY,
President.

SCHEDULE "A.-#3."

$25,000.00. New York, April 17, 1917.

On or before January 15th, 1918, for value received, the undersigned, Alaska Mines Corporation, promises to pay to Herbert Greenberg or order, at Empire Trust Company, 120 Broadway, in the Borough of Manhattan, City of New York, the sum of Twenty-five Thousand Dollars ($25,000), with interest at the rate of six per centum per annum, payment to be made in gold coin of the United States. If suit shall be commenced for recovery of any amount due upon this note, the undersigned agrees to pay, as attorney's fees thereon, such additional sum as the Court may adjudge reasonable.

This note is one of a series of three, aggregating the sum of forty thousand dollars ($40,000), all secured by a certain mortgage executed by the undersigned, of even date herewith, and it is hereby stipulated that if this note or any of them, is not paid on the day when due, and the default shall continue as

provided in said mortgage all of said notes shall become due and payable.

ALASKA MINES CORPORATION.
By JAMES GAYLEY,
President. **[61]**

III.

The Court finds, that contemporaneously with the execution and delivery of said promissory notes the said defendant, to secure the payment thereof, made, executed and delivered to plaintiff a certain indenture of mortgage of real and personal property, situated in the Cape Nome Recording Precinct, Territory of Alaska, Second Division, a true copy of which said mortgage is annexed to plaintiff's complaint, and is as follows:

#65687.

THIS INDENTURE OF MORTGAGE made and entered into this 17th day of April, 1917, between Alaska Mines Corporation, a corporation organized and existing under and pursuant to the laws of the Commonwealth of Virginia, party of the first part (hereinafter referred to as the "Mortgagor") and HERBERT GREENBERG, of Nome, Alaska, party of the second part (hereinafter referred to as the "Mortgagee"), WITNESSETH:

The Mortgagor, for and in consideration of the sum of One Dollar ($1.00) or other valuable considerations to it in hand paid by the Mortgagee, the receipt whereof is hereby acknowledged, and in order to secure the payment to the Mortgagee of the sum of Forty Thousand Dollars ($40,000) as evidenced by three promissory notes in writing, aggregating

said sum, made, and executed and delivered by the Mortgagor to the Mortgagee, all bearing even date herewith, copies of which are hereto annexed, marked Schedule "A," does hereby grant, bargain, sell, and convey unto the mortgagee, his heirs, executors, administrators and assigns, all of the following described real and personal property situate in the Cape Nome Mining District, Seward Peninsula, Territory of Alaska;

An undivided fifty-one per cent interest in The Holyoke No. 2 Claim on Holyoke Creek, a tributary of Bourbon Creek, a tributary of Dry Creek, a tributary of Snake River, together with a dredge hull and all timbers, steel, iron, bolts and appliances purchased for the same, situated on said The Holyoke No. 2 Claim on Holyoke Creek, or stored for said hull, and wherever situated.

TO HAVE AND TO HOLD the above granted premises unto the Mortgagee, his heirs, executors, administrators and assigns forever. The above property being the same property conveyed and transferred by the Mortgagee to the Mortgagor by deed and bill of sale bearing even date herewith, this mortgage and the notes secured hereby being given to secure payment of a part or portion of the purchase money consideration paid for said property. Provided always that if the Mortgagor or its successors and assigns shall pay unto the Mortgagee or his heirs, executors, administrators and assigns, the said sums of money mentioned in the aforesaid promissory notes and the interest thereon, at the time and in the manner mentioned in the said promissory

notes, then and in that event these presents and the estate hereby granted shall cease, determine and become void.

And the parties hereto covenant and agree as follows:

FIRST. That the Mortgagor will pay the indebtedness as provided in this mortgage, and if default be made in the payment of any note, and such default shall continue for a period of sixty days after notice and demand in writing, then and in such event all of said notes immediately and forthwith shall become due and payable, and it shall be lawful for the Mortgagee, his heirs, executors and administrators and assigns, to take immediate possession of all the personal property hereinbefore conveyed and transferred, and sell the same at public sale in the manner provided by law and apply the proceeds as far as may be, to the payment of the amount then due, together with **[62]** the costs and expenses of sale, including all reasonable expense of taking possession of, keeping and caring for said personal property. The United States Marshal*l* of the Second District of the District of Alaska is hereby authorized to execute the power of sale herein granted to said Mortgagee, his heirs, executors, administrators and assigns, or in case of such default and its continuance as aforesaid, the Mortgagee may proceed to foreclose this mortgage by suit at law in any court of competent jurisdiction. Notwithstanding this mortgage, the real and person*aky* property hereinbefore mentioned may remain in possession of the

Mortgagor until default and its continuance, as aforesaid.

SECOND. That if default be made in the payment of any of said notes when due, and said default shall continue for a period of sixty days after notice and demand in writing, or if default shall be made in the payment of any interest, taxes, or assessments and such default shall continue for a period of sixty days after like notice and demand, then and in such event all of said notes immediately and forthwith shall become due and payable and the Mortgagee shall have power to sell the realty herein described according to law, and that upon such default, and its continuance as foresaid, the Mortgagee shall have the right forthwith to enter upon the mortgaged premises, receive all of the proceeds, rents, issues and profits therefrom and apply the same, after payment of all necessary charges and expenses, on account of the amount hereby secured, and said proceeds, rents issues, and profits are, in the event of such default, and its continuance, as aforesaid, hereby assigned to the Mortgagee.

THIRD. That the Mortgagee shall have the right upon any such default and the continuance of such default as aforesaid, and upon the commencement of any proceedings to foreclose this mortgage, to apply for and shall be entitled, as a matter of right without consideration of the valeue of the mortgaged premises as security for amounts due the Mortgagee or of the solvency of any person or persons liable for the payment of such amounts to the appointment of a Receiver of the rents, issues and profits or other pro-

ceeds from the real property above mortgaged.

FOURTH. That the Mortgagee may at his option, pay any lawful tax, charge, or assessment upon said property and said payment together with expenses incurred in connection therewith shall become part*y* of the principal sum due from the Mortgagor to the Mortgagee.

FIFTH. That any notice required herein to be given by the Mortgagee to the Mortgagor may be either personally served or be served by mail through the United States Postoffice by registered letter addressed to the Mortgagor at its principal place of business in the Territory of Alaska, or its office in the Borough of Manhattan, City of New York, or it may be served upon the agent of the Mortgagor appointed in Alaska pursuant to statute.

SIXTH. That the Mortgagor shall pay over to the Mortgagee fifteen per cent of all gold yielded or produced through any mining or dredging operations upon the property herein described, as said yield or production occurs, and that the Mortgagee shall apply said gold at its then value in gold coin of the United States of America, as a payment or payments in reduction of the amounts then due to the Mortgagee from the Mortgagor by reason of the above mentioned promissory notes, the said amounts being credited upon said promissory notes in the order of their maturity.

SEVENTH. That this mortgage is intended to cover not only the dredge herein described with all the appurtenances thereto, now located upon the real property hereinbefore described, but also any and all

improvements and additions to said dredge and its appurtenances and to each and every and all of the parts thereof, and as said additions, changes, alterations, and improvements are made they, by virtue of this mortgage, shall become a part of said dredge and shall not be removable therefrom and shall become subject to this mortgage.

IN WITNESS WHEREOF, The ALASKA MINES CORPORATION has caused these presents to be executed in triplicate by its President, and its corporate seal to be hereunto affixed, attested by its Secretary, the day and year first above written.

ALASKA MINES CORPORATION,

[Corporation Seal] By JAMES GAYLEY,

President.

Attest: WALTER S. REED. [63]

United States of America,
Southern District of New York,
County of New York,—ss.

On this 17th day of April, 1917, before me, a Notary Public in and for the County of New York, personally appeared James Gayley and Walter S. Reed, each of whom is to me personally known, and known to me to be the persons who executed the foregoing instrument, the said James Gayley as the President of the Alaska Mines Corporation, and the said Walter S. Reed as the Secretary of the Alaska Mines Corporation, and they severally acknowledged to me that they executed the aforegoing mortgage of both real and personal property in the name of, and as the act and deed of the Alaska Mines Corporation,

and by its auth*orty* and that they so executed the same freely and voluntarily and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

[Not*o*rial Seal] JOHN H. GEWECKE,

Notary Public, King County, No. 23, Certificate Filed in New York County.

Commission expires Mar. 30, 1918.

State of New York,
County of New York,—ss.

No. 42,780, Series B.

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY, that John H. Gewecke whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and therein written, was, at the time of taking such deposition or proof and acknowledgment, a Notary Public acting in and for the said County, duly commissioned and sworn, and authorized by the laws of said State to take depositions, and also acknowledgments and proof of Deeds, or conveyances for land, tenements, or hereditaments in said State of New York. That there is on file in the Clerk's office of the County of New York, a certified copy of his appointment and qualification as Notary Public of the County of Kings with his autograph signature. And further, that I am well acquainted with the handwriting of such N*ortay* Public and verily believe

that the signature to said deposition, or certificate of proof or acknowledgmen is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County this 17th day of April, 1917.

[Notorial Seal]

WILLIAM F. SCHNEIDER,
Clerk.

United States of America,
Southern District of New York,
County of New York,—ss.

Walter S. Reed, being first duly sworn, on oath, deposes and says: That he is Secretary of the Alaska Mines Corporation, which is a corporation and the Mortgagor named in the aforegoing mortgage; that the same is made in good faith to secure the amount named therein, and without any design to hinder, delay or defraud creditors.

WALTER S. REED.

Subscribed and sworn to before me this 17th day of April, 1917.

[Notorial Seal]

JOHN H. GEWECKE,
Notary Public, Kins County, No. 23, Certificate Filed in New York County, No. 44, Kings County Regesters' No. 8024, New York County, Register's No. 8054.

Commission expires Mch. 30, 1918.

State of New York,
County of New York,—ss.

I, William F. Schneider, Clerk of the Court of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY, that John H. Gewecke, whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was at the time of taking such deposition or proof and acknowledgment, a Notary Public, acting in and for the said County, duly commissioned and sworn, [64] and authorized by the laws of said State to take depositions and also acknowledgments and proofs of Deeds, or conveyances for, land, tenements, or hereditaments in said State of New York. That there is on file in the Clerk's office of the County of New York, a certified copy of his appointment and qualification as Notary Public of the County of Kings with his autograph signature. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition, or certificate or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County this 17 day of April, 1917.

[Notorial Seal]

WM. F. SCHNEIDER,
Clerk.

United States of America,
Southern District of New York,
County of New York,—ss.

Herbert Greenberg, being first duly sworn on oath, deposes and says: That he is the Mortgagee named in the foregoing mortgage; that the same is made in good faith to secure the amount named therein and without any design to hinder, delay or defraud creditors.

HERBERT GREENBERG.

Subscribed and sworn to before me this 17th day of April, 1917.

[Notorial Seal]

WM. E. CONLEY,

Notary Public in and for the County and State of New York. #155.

My commission expires March 30, 1919.

State of New York,
County of New York,—ss.

No. 42,826, Series B.

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY, that Wm. E. Conley, whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such depositions, or proof and acknowledgment, a Notary Public in and for such County, duly commissioned and sworn, and authorized by the laws

of said State, to take depositions and to administer oaths to be used in any Court of said State, and for general purposes; and also to take acknowledgments and proof of deeds, of conveyances for land, tenements or hereditaments in said State of New York, and further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition or certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County, the 17th day of April, 1917.

[County Seal] WM. F. SCHNEIDER,

Clerk.

SCHEDULE "A."

$5,000.00 New York, April 17, 1917.

On or before June 15, 1917, for value received, the undersigned, Alaska Mines Corporation, promises to pay to Herbert Greenberg or order, at Empire Trust Company, 120 Broadway, in the Borough of Manhattan, City of New York, the sum of Five thousand dollars ($5,000.00) with interest at the rate of six per centum per annum, payment to be made in gold coin of the United States. If suit shall be commenced for recovery of any amount due upon this note, the undersigned agrees to pay, as attorney's fees thereon, such additional sum as the Court may adjudge reasonable.

This note is one of a series of three, agreegating the sum of forty-thousand dollars ($40,000) all secured by a certain mortgage, executed by the undersigned, of even date herewith, and it is hereby stipu-

lated that if this note, or any of them, is not paid on the day when due, and default shall continue as provided in said mortgage, all of said notes shall become due and payable.

ALASKA MINES CORPORATION.
By JAMES GAYLEY,
President. **[65]**

SCHEDULE "A-2."

$10,000.00.

On or before November 15th, 1917, for value received, the undersigned, Alaska Mines Corporation, promises to pay to Herbert Greenberg, or order, at Empire Trust Company, 120 Broadway, in the Borough of Manhattan, City of New York, the sum of Ten Thousand Dollars ($10,000,) with interest at the rate of six per centum per annum, payment to be made in gold coin of the United States. If suit shall be commenced for recovery of any amount due upon this note, the undersigned agrees to pay as attorney's fees thereon, such additional sum as the Court may adjudge reasonable.

This note is one of a series of three, aggregating the sum of forty thousand dollars ($40,000) all secured by a certain mortgage, executed by the undersigned, of even date herewith, and it is hereby stipulated that if this note, or any of them, is not paid on the day when due, and default shall continue, as provided in said mortgage, all of said notes shall become due and payable.

ALASKA MINES CORPORATION,
By JAMES GAYLEY,
President.

SCHEDULE "A-#3."

$25,000.00.

On or before January 15th, 1918, for value received, the undersigned, Alaska Mines Corporation, promises to pay to Herbert Greenberg, or order at Empire Trust Company, 120 Broadway, in the Borough of Manhattan, City of New York, the sum of Twenty-five thousand dollars ($25,000) with interest at the rate of six per centum per annum, payment to be made in gold coin of the United States. If suit shall be commenced for recovery of any amount due upon this note, the undersigned agrees to pay, as attorney's fees thereon, such additional sum as the Court may adjudge reasonable.

This note is one of a series of three, aggregating the sum of forty thousand dollars ($40,000) all secured by a certain mortgage, executed by the undersigned, o*d* even date herewith, and it is hereby stipulated that if this note, or any of them, is not paid on the day when due, and default shall continue, as provided in said mortgage, all of said notes shall become due and payable.

ALASKA MINES CORPORATION,
By JAMES GAYLEY,
President.

Recorded June 11, 1917, 9:40 A. M., at request of W. A. Gilmore.

JAMES FRAWLEY,
Recorder.

IV.

The Court finds that at the time of the execution of said mortgage the said defendant was, and still is. the

owner of the real and personal property described in said mortgage and thereby mortgaged to plaintiff.

V.

The Court finds that said mortgage was duly executed by the said defendant in the presence of one witness, who signed the same as a witness thereto, and was duly acknowledged by the said defendant, [66] Alaska Mines Corporation, a corporation, by its said president, James Gayley, who was thereunto duly authorized, before a notary public, so as to entitle it to be recorded, and at the time of the execution of said mortgage there was attached thereto the affidavits of Walter S. Reed, the secretary of said corporation mortgagor, who was thereunto duly authorized, and Herbert Greenberg, the mortgagee therein named, which said affidavits were to the effect that said mortgage was made in good faith to secure the amount named therein, and without any design to hinder, delay or defraud creditors.

VI.

The Court finds that said mortgage was thereafter on the 11th day of June, 1917, filed for record and recorded in the office of the recorder of deeds and mortgages of Cape Nome Precinct, Territory of Alaska, Second Division, in Volume 193, page 154, and was also on the 10th day of August, 1917, filed in said office as a chattel mortgage, and ever since has been, and now is, on file therein.

VII.

The Court finds, that the said defendant, Alaska Mines Corporation, has not paid said promissory notes in said mortgage set out and designated

Schedule "A," Schedule "A-2" and Schedule "A-3," except the promissory notes marked Schedule "A" and Schedule "A-2"; and that no part of said promissory note designated and marked Schedule "A-3," or any interest due thereon, has been paid, save and except the sum of Twenty-five Hundred Dollars ($2500.00), which said sum was paid on April 17th, 1917, and the same is now, and for a long time has been, due and payable from the defendant to the plaintiff.

VIII.

The Court finds that notice and demand in writing were duly served on said defendant corporation by plaintiff, as provided in said mortgage, after said promissory note marked Schedule "A-3" became due, and a period of more than sixty days has elapsed since said notice and demand in writing were so served, as aforesaid, and said defendant has been, and still is, in default, of the payment thereof, and no part of said promissory note designated Schedule "A-3," or any part of the interest accrued thereon has been paid, save and except the said sum of Twenty-five Hundred Dollars ($2500.00) paid on April [67] 17th, 1917, and the balance thereof, together with accrued interest, is now due, owing and unpaid from the defendant to the plaintiff.

IX.

The Court finds that the personal property mentioned and described in said mortgage is now in the possession of said defendant, its agents and bailees, in the Precinct, Territory and Division aforesaid.

X.

The Court finds that the plaintiff is the lawful owner and holder of said mortgage and said promissory note designated Schedule "A-3."

XI.

The Court finds that no proceedings have been had at law or otherwise, for the recovery of said sum and interest due on said promissory note marked Schedule "A-3" or any part thereof.

XII.

The Court finds there is due, owing and unpaid from defendant to plaintiff, in principal and interest, on said promissory note designated as Schedule "A-3" the sum of Twenty-four Thousand Nine Hundred and Ninety Dollars ($24,990.00).

XIII.

The Court finds that the sum of Twenty-four Hundred and Ninety-nine Dollars ($2499.00) is a reasonable sum to be allowed for attorney's fees for the commencement and prosecution of this action to foreclose said mortgage.

XIV.

The Court finds that the defendant has and maintains its principal business office at 71 Broadway New York, and that on the 11th day of January, 1918, one George K. McLeod served upon the defendant at its said office, the notice in paragraph XIV of defendant's answer set forth, and at the same time and place exhibited the instrument annexed to said answer and marked Exhibit "A" attached to Exhibit "C." [68]

XV.

The Court finds that the allegations contained in

paragraphs XVI, XVII, XVIII, XX and XXI of defendant's answer are true.

XVI.

The Court finds that the Supreme Court for the County of New York, State of New York, is a court of general jurisdiction. The Court finds that the attachment and garnishment issued out of said court and levied against the property of Herbert Greenberg has been released, vacated and set aside by order of said court on the 27th day of September, 1918, and is no longer of any force or effect.

XVII.

The Court finds that the allegations contained in paragraph XXIII of defendant's answer are true.

XVIII.

The Court finds that George K. McLeod has no interest in the note and mortgage sued upon in this action; and that the said George M. McLeod is not a proper or necessary party to this action.

XIX.

The Court finds that the Empire Trust Company of New York, held said note on January 15th, 1918, for collection, as the agent of plaintiff herein, and on said date presented said note for payment to the defendant, and offered to cancel and surrender said note upon the receipt of payment of its face value on said date. That at said time and place said defendant offered said Empire Trust Company the defendant's uncertified check for the sum of Twenty-three Thousand Five Hundred and Twelve and 50/100 Dollars ($23,512.50) conditioned upon a demand for a written release of the mortgage sued upon herein, to be

executed by this plaintiff and one George K. McLeod, and said defendant refused to deliver said check, or to pay said note, under any other conditions.

XX.

The Court finds that the defendant never made any lawful tender to plaintiff of payment of said note on the 15th day of January, 1918, or at any time, or at all. [69]

XXI.

The Court finds that plaintiff at all times has been ready, willing and able to satisfy said mortgage as of record, upon the payment of the amount due thereon.

XXII.

The Court finds that the defendant failed, refused and neglected, and still fails, refuses and neglects to deposit into this court the sum of Twenty-three Thousand Five Hundred and Twelve and 50/100 Dollars ($23,512.50) alleged in paragraph XXV of its answer, or any other sum, in payment of the note and mortgage sued upon herein, and that the said sum is now unpaid, and never has been available to the plaintiff herein.

XXIII.

The Court finds that each and all of the allegations and averments in the first cause of action in plaintiff's complaint contained are true and correct.

CONCLUSIONS OF LAW.

As Conclusions of Law from the foregoing Findings of Fact, the Court finds:

I.

That the plaintiff, Herbert Greenberg, is entitled to a judgment and decree against the defendant, Alaska

Mines Corporation, a corporation, for the sum of Twenty-four Thousand Nine Hundred and Ninety Dollars ($24,990.00) with interest at the rate of eight per cent, per annum from February 21st, 1919, being the date of the entry of decree herein, together with the sum of Twenty-four Hundred and Ninety-nine Dollars ($2,499.00) as attorney's fees in this action, and costs of suit taxed at the sum of $——.

II.

That the said judgment in favor of plaintiff, Herbert Greenberg, be adjudged a prior lien by virtue of the said mortgage upon all the real and personal property described therein, and that said mortgage therein mentioned be foreclosed in the manner provided [70] by law, and the real and personal property therein described sold in the manner provided by law, and the proceeds thereof applied to the payment of the amount found due to the plaintiff on the said promissory note designated as Schedule "A–3," together with interest, attorney's fees and costs, and that any surplus be delivered to the said defendant.

III.

That by virtue of the agreement between plaintiff herein and one George K. McLeod, described in paragraph XIV of defendant's answer and annexed thereto and marked Exhibit "A" attached to Exhibit "C," plaintiff became a trustee of an express trust, and may sue without joining with him the person for whose benefit the action is prosecuted.

IV.

That no lawful tender of the amount due upon said note and mortgage sued upon herein has ever been

made by defendant to plaintiff.

Done in open court this 10th day of March, 1919.

WM. A. HOLZHEIMER,
District Judge.

[Endorsed]: No. 2779. In the District Court for the Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corporation, a Corporation, Defendant. Findings of Facts and Conclusions of Law. Filed in the Office of the Clerk of the District Court of the Territory of Alaska, Second Division at Nome. Feb. 27, 1919. Thos. McGann, Clerk. By ——, Deputy. M. Hugh O'Neill, Attorney for Plaintiff. Orders & Judgments, Vol. 11, Page 525. C. [71]

In the District Court for the Territory of Alaska, Second Division.

No. 2779.

HERBERT GREENBERG,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,

Defendant.

Judgment.

This cause coming on regularly for trial before the Court on the 21st day of February, 1919, the plaintiff, Herbert Greenberg, appearing by his attorney, Hugh O'Neill, Esq., and the defendant, Alaska

Mines Corporation, a corporation, appearing by its attorney, O. D. Cochran, Esq., and the Court having heard the testimony on behalf of the plaintiff, which said testimony was both oral and documentary, and the defendant having offered no testimony, and the Court from such testimony introduced on behalf of plaintiff having made and filed its Findings of Fact and Conclusions of Law—

NOW, THEREFORE, on motion of Hugh O'Neill, Esq., counsel for plaintiff,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, Herbert Greenberg, do have and recover of and from the defendant, Alaska Mines Corporation, a corporation, the sum of Twenty-four Thousand Nine Hundred and Ninety Dollars ($24,990.00), with interest at the rate of eight per cent per annum from the 21st day of February, 1919, together with the sum of Twenty-four Hundred and Ninety-nine Dollars ($2499.00) attorney's fees in this suit, and the costs of suit taxed at $——. That the amount of the judgment aforesaid in favor of said plaintiff, and against said defendant, is a valid, prior lien by virtue of the mortgage described in plaintiff's complaint, upon all the real and personal property therein set forth, and hereinafter particularly described. [72]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said real and personal property described in said mortgage, and in the findings of the Court herein, be sold in the manner provided by law by the United States Marshal of the Second Division of Alaska, according to the course and prac-

tice of this court, and that the said United States Marshall sell first, the personal property mentioned and described in said mortgage and findings of fact, and which consists of a dredge hull and all timbers, steel, iron bolts and appliances purchased for the same, situated on Holyoke No. 2 claim, on Holyoke Creek, or stored for said hull, and wherever situated. And the proceeds of said sale by said Marshal, after deducting the costs and expenses of sale, be applied to the satisfaction of the judgment of the plaintiff hereinbefore set forth, and that if sufficient be not realized from the sale of said personal property to satisfy and discharge the amount due plaintiff, the hereinafter described real property mentioned and set forth in the complaint in this action be sold by the said Marshal in the manner prescribed by law, and according to the course and practice of this court, and the proceeds of such sale be applied by the said Marshal, first, to the costs and expenses of sale, and the balance, if any, upon the judgment of the plaintiff herein, in satisfaction and discharge thereof, and the overplus, then remaining, if any there be, be paid by the Marshal over to the said defendant, Alaska Mines Corporation, a corporation. That a description of the real property so ordered to be sold is as follows: An undivided fifty-one per cent interest in the Holyoke No. 2 claim on Holyoke Creek, a tributary of Bourbon Creek, a tributary of Dry Creek, a tributary of Snake River.

That the defendant, the Alaska Mines Corporation, a corporation, and all persons claiming or to claim from or under it, and all persons having liens

subsequent to the said mortgage upon the lands and premises described in said mortgage, and his personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their heirs or personal representatives, [73] and all persons claiming to have acquired any estate or interest in said premises subsequent to said mortgage, be forever barred and foreclosed of and from all equity of redemption and claim of in and to the said mortgaged premises, and every part and parcel thereof, from and after the delivery of the Marshal's deed therefor.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the purchaser or purchasers of said real property at said sale be let into possession thereof, and that any parties to this action who may be in possession thereof, and any person who since the commencement of this action has come into possession under either of them, deliver their possession thereof to such purchaser or purchasers on production of the Marshal's certificate of sale for such premises, or any part thereof.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if the moneys arising from the said sale of real and personal property shall be insufficient to pay the amount found due the plaintiff, as above stated, with interest and costs and expenses, as aforesaid, the United States Marshal to specify the amount of such deficiency and balance due to the plaintiff in his return for sale, and that the Defendant, Alaska Mines Corporation, a corporation, pay unto the said plaintiff the amount of such

deficiency, with interest thereon at the rate of eight per cent per annum from the date of said last-mentioned return; and that plaintiff have execution therefor.

Done in open court this 15th day of March, 1919.

WM. A. HOLZHEIMER,
District Judge.

[Endorsed]: No. 2779. In the District Court for the Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corporation, a Corporation, Defendant. Proposed Judgment. Filed in the Office of the Clerk of the District Court of the Territory of Alaska, Second Division, at Nome. Feb. 27, 1919. Thos. McGann, Clerk. By ——, Deputy. M. Final Judgment. Filed in the Office of the Clerk of the District Court of the Territory of Alaska, Second Division, at Nome. Mar. 15, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy. [74] Hugh O'Neill, Attorney for Plaintiff. Orders & Judgments, Vol. 11, Page 531–C. [75]

In the District Court for the Territory of Alaska, Second Division.

No. 2779.

HERBERT GREENBERG,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that on the 1st day of February, 1919, the defendant's motion to make one George K. McLeod a party to this action came on for hearing before the Hon. William A. Holzheimer, Judge of the District Court for the Territory of Alaska, Second Division; the plaintiff appearing by his attorney, Hugh O'Neill, and the defendant appearing by its attorney, O. D. Cochran, and the following proceedings were had and taken:

The Court thereupon heard and considered the issue joined by the following motion, and answer to motion, heretofore filed by the defendant and by the plaintiff respectively:

"*In the District Court for the Territory of Alaska, Second Division.*

No. 2779.

HERBERT GREENBERG,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,

Defendant.

Motion for Order Directing that George K. McLeod be Made Party Plaintiff to Action.

Comes now the defendant and moves the Court to make an order herein requiring and directing that one George K. McLeod be brought in and made a party plaintiff or defendant in the above-entitled

action; and that process necessary to making said George K. McLeod a party be regularly issued out of said court and cause, for the reason that it is shown by the pleadings herein that the said George K. McLeod has and claims an undivided [76] 11/40 interest in the promissory note and mortgage which are the subject matter of said action, and that said George K. McLeod is a real party in interest in said action and is a necessary party to a complete determination thereof.

This motion is made and based upon the pleadings, records and files in the above-entitled court and cause.

O. D. COCHRAN,
Attorney for Defendant.

(Endorsed on Back): No. 2779. In the District Court for the Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corporation, a Corporation, Defendant. Motion. Filed in the Office of the Clerk of the District Court of the Territory of Alaska, Second Division, at Nome, Jan. 31, 1919. Thos. McGann, Clerk, by D. Deputy. O. D. Cochrán, Attorney for Defendant, Nome, Alaska.

In the District Court for the Territory of Alaska, Second Division.

No. 2779.

HERBERT GREENBERG,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,

Defendant.

Answer to Motion for Order Directing that George K. McLeod be Made Party Plaintiff to Action.

Comes now the plaintiff in the above-entitled cause, and for answer to motion requiring and directing that one George K. McLeod be brought in and made a party plaintiff or defendant in the above-entitled cause, alleges as follows:

I.

That said George K. McLeod has no interest whatsoever in the promissory note and mortgage which are the subject matter of said action. [77]

II.

That said George K. McLeod is a resident of the State of New York, and is at the present time living outside of the Territory of Alaska.

III.

That Herbert Greenberg is the trustee of an express trust.

IV.

That George K. McLeod is not a necessary or

proper party to a complete determination of this action.

This answer to motion is based upon two agreements attached hereto and made a part hereof, and marked for identification Exhibits "A" and "B," respectively, upon the testimony to be introduced at the hearing hereof, and upon all the records, papers and files in the above-entitled action.

HUGH O'NEILL,
Of Counsel for Plaintiff.

RECITAL.—Exhibit "A" attached to the foregoing answer to motion is an exact copy of the contract received in evidence upon the hearing of said motion and marked Plaintiff's Exhibit "B," and Exhibit "B" attached to said foregoing answer to motion is an exact copy of the contract received in evidence upon the hearing of said motion and marked Plaintiff's Exhibit "A." [78]

(Endorsed on back): "In the District Court for the Territory of Alaska, Second Division, No. 2779. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corporation, a Corporation, Defendant. Answer to Motion. Filed in the Office of the Clerk of the District Court of the Territory of Alaska, Second Division, at Nome. Feb. 11, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy. Hugh O'Neill, of Counsel for Plaintiff."

In support of the answer to the motion plaintiff offered Exhibit "A," which was received in evidence, without objection, of which the following is a copy:

Plaintiff's Exhibit "A."

#65728.

AGREEMENT made this 17th day of April, in the year one thousand nine hundred and seventeen, between HERBERT GREENBERG, of Nome, Alaska (hereinafter referred to as "Greenberg"), party of the first part, and ALASKA MINES CORPORATION, a corporation organized and existing under and pursuant to the laws of the Commonwealth of Virginia (hereinafter referred to as the "Corporation"), party of the second part.

WITNESSETH: WHEREAS, Greenberg is desirous of granting [79] to the Corporation and the Corporation is desirous of obtaining from Greenberg, an option to purchase certain mining claims situated in the Cape Nome Mining and Recording District, District of Alaska, upon the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, and one dollar ($1.00) by each party to the other in hand paid, the receipt whereof is hereby acknowledged, the parties hereto agree with each other as follows:

FIRST. Greenberg agrees to grant, and hereby does grant, to the Corporation, an option or right to purchase from Greenberg, upon the terms and conditions hereinafter set forth, certain mining claims situated in the Cape Nome Mining and Recording District, District of Alaska, known and more particularly described as follows:

Un undivided one-half interest in the Bessie Claim, being first Bench off Holyoke Creek No. 4 Left Limit; also No. 3 Claim Holyoke Creek, a tributary of Bourbon Creek, a tributary of Snake River; also Legal Tender Bench Claim off No. 3 Holyoke Left Limit, Roxie Fraction Claim situate on the North side of the Bessie Claim; Solomon Fraction Claim joining the north end of No. 4 Holyoke Creek, it being understood that Greenberg is the owner of an option for the purchase of one-half interest in the Roxie Fraction Claim situate on the north side of the Bessie Claim and is the owner of the remaining one-half interest in said claim, and is the owner of an option for the purchase of Solomon Fraction Claim joining the north end of No. 4 Holyoke Creek, hereinabove described, and that Greenberg agrees to exercise said options and to acquire title to said claims prior to the date of the first payment to be made by the Corporation to Greenberg, as hereinafter provided. The option hereby granted shall expire on the first day of June, 1918, and the election of the Corporation to exercise the same shall be evidenced by the Corporation making payment to Greenberg in full of the first installment, to wit, the sum of twenty-five thousand dollars [80] ($25,000) on or before June 1st, 1918, on account of the total purchase price of one hundred and twenty-five thousand dollars ($125,000) to be paid hereunder.

SECOND. In the event the Corporation pays to Greenberg the sum of twenty-five thousand dollars ($25,000) as aforesaid, on or before June 1st, 1918, it hereby agrees to make payment of the further sum

of one hundred thousand dollars ($100,000), as follows:

Twenty-five thousand dollars ($25,000) on or before January 15th, 1919;

Twenty-five thousand dollars ($25,000) on or before June 1st, 1919;

Twenty-five thousand dollars ($25,000) on or before January 15th, 1920; and

Twenty-five thousand dollars ($25,000) on or before December 31st, 1920, said payments to be made to Greenberg by depositing same to his credit at the Empire Trust Company, 120 Broadway, New York City.

THIRD. Simultaneously with the execution and delivery hereof, Greenberg agrees to execute and acknowledge a good and sufficient deed of conveyance covering all of the property hereinabove described, conveying the same to the Corporation, its successors and *and* assigns, with covenants, warranting to defend the title of Greenberg thereto, and further agrees on the execution of these presents, to place said deed in escrow with said Empire Trust Company, and to give instructions to said Empire Trust Company to deliver the same to, or upon the order of, the Corporation, its successors and assigns, upon the payment to Greenberg, as herein set forth, of the sum of one hundred and twenty-five thousand dollars ($125,000). When the payments made to Greenberg through said Trust Company and/or the receipts signed by him, deposited with said Trust Company aggregate the sum of one hundred and twenty-five thousand dollars ($125,000), the same shall be

sufficient evidence of the payment of said sum to Greenberg, and to [81] warrant the delivery by the Trust Company to the Corporation of the deed herein referred to, and the Trust Company shall be fully protected in relying thereon.

FOURTH. Greenberg hereby agrees that the Corporation, its successors and assigns, may forthwith upon the execution of these presents, enter upon the premises hereinabove described and prospect the same; granting unto said Corporation the right to dredge said property and extract minerals therefrom.

FIFTH. The Corporation agrees that in the event that the Corporation shall prospect said property and dredge the same and extract minerals therefrom, said Corporation will pay to Greenberg a sum or sums of money equivalent to fifteen per cent of the gross output of said property, as cleanups are made, by depositing said sum or sums from time to time with said Empire Trust Company, to the credit of Greenberg, and the Corporation further agrees that it will render sworn statements to Greenberg showing the gross output of said property as said cleanups are made, and will permit Greenberg to be present and to inspect said cleanups when and as the same are made.

SIXTH. Greenberg hereby agrees that all sums paid to him by the Corporation, in pursuance of the provisions of paragraph "Fifth" of this agreement, shall be applied by Greenberg to the payments to be made by the Corporation to Greenberg in accordance with the terms of this agreement as provided in paragraph "Second" hereof, and shall be duly credited

by Greenberg as payments on account thereof, it being understood and agreed that in no event shall the Corporation be obligated to make payments to Greenberg in excess of the sum of one hundred and twenty-five thousand dollars ($125,000).

SEVENTH. Greenberg covenants that, with the exception of the property which he holds under the option as hereinabove described, he is seized of the premises above described and of each and every parcel thereof, in fee simple, and has a good right to convey and [82] transfer the same, and that said premises are free from encumbrances and further agrees that in the event of any litigation arising regarding the title of the aforesaid claims, or any of them, during the terms of this agreement, said Greenberg shall defend said litigation at his own expense, it being further understood and agreed that during the pendency of any such litigation the obligation of the Corporation to make payments in accordance with the terms of this agreement shall be suspended, and that in the event that said litigation shall terminate adversely to the title of Greenberg, the obligation of the Corporation to make payments in accordance with the terms of this agreement shall cease and determine, and all sums paid by the Corporation hereunder shall be forthwith repaid to the Corporation. Anything in this paragraph to the contrary notwithstanding, however, it is understood and agreed that if any litigation shall arise regarding the title to the claims hereinabove described and known as Legal Tender Bench Claim off No. 3 Holyoke, Roxie Fraction Claim situate on the North end of

Bessie Claim and Solomon Fraction Claim joining the North end of No. 4 Holyoke Creek, or any of them, during the term of this agreement, the obligation of the Corporation to make payments in accordance with this agreement shall not be suspended, provided that Greenberg shall give to the Corporation a bond with Greenberg as principal and a surety company as surety thereon, which surety company shall be authorized to execute said bond of indemnity and the bonds of which are acceptable to the Courts of the District of Alaska or the State of New York, or with an individual satisfactory to the Corporation as surety thereon, which bonds shall provide for the payment to the Corporation of the following sum or sums in the event that the litigation in respect of said title or titles shall result adversely to the title of Greenberg, namely:

Legal Tender Bench Claim off No. 3 Holyoke, Eight Thousand Dollars ($8,000).

Roxie Fraction Claim situate on the North end of Bessie Claim, [83] Four thousand five hundred dollars ($4,500); and

Solomon Fraction Claim joining the North end of No. 4 Holyoke Creek, four thousand five hundred dollars ($4,500).

It is further understood and agreed that in the event that the litigation in respect of said title or titles shall result adversely to the title of Greenberg, and the Corporation shall recover the amount or amounts hereinabove set forth in respect of any claim or claims, the same shall be deemed to be full indemnity to the Corporation for the failure of Greenberg

to convey good title to said claim or claims, and the Corporation shall make no further claim hereunder by reason of the failure of Greenberg to convey good title to said claim or claims.

EIGHTH. In the event that the Corporation shall fail to make payments in accordance herewith, on or before the dates upon which the same become due, as hereinbefore specified, and such default shall continue for a period of sixty days, then, and in that event upon the expiration of such sixty day period, this agreement shall become null and void and all moneys previously paid shall become forfeited to Greenberg as and for liquidated damages, without any further obligation or liability whatsoever on the part of the Corporation to make any other or further payment hereunder or on account thereof;

Anything in this paragraph to the contrary notwithstanding, it is understood and agreed that the Corporation shall exercise its option hereunder by the payment to Greenberg of the sum of twenty-five thousand dollars ($25,000), on or before the first day of June, 1918, and in the event of its failure to do so, all rights of the Corporation hereunder shall cease and determine.

NINTH. It is understood and agreed that Greenberg reserves the right until June 1st, 1918, to mine, by any other method except dredging the Bessie claim and #4 Holyoke claim and shall also have the right to sluice and cleanup any dumps or tailings for a period [84] of ninety days after mining operations have ceased, and said Greenberg covenants and agrees to pay as royalty to the Corporation a sum or

sums of money equivalent to twenty per cent of the gross amount received out of his undivided one-half interest in the Bessie Bench claim only by or through said mining operations, said payments to be made as cleanups are made, and it is further agreed that any and all such payments shall be applied and credited by Greenberg as payments made by the Corporation to Greenberg in reduction of any payment or payments still due under the terms of this agreement in the order of said payments, as provided in this agreement, and signed receipts therefor shall be delivered to the Corporation or deposited by Greenberg with the Empire Trust Company as evidence of such payments. Greenberg further agrees that he will render sworn statements to the Corporation showing the gross amount received by Greenberg out of his undivided one-half interest in the Bessie Bench claim, by or through said mining operations, and further agrees that the Corporation through its then General Manager in Alaska may be present and inspect all cleanups when and as made.

TENTH. It is understood and agreed that all extensions of time granted to the Corporation to exercise its option hereunder shall be in writing and any extension of time granted to the Corporation shall automatically extend the right of Greenberg, for an equivalent period, to mine and clean up, as in paragraph "Ninth" of this agreement provided.

ELEVENTH. This agreement shall bind the heirs, executors, administrators and assigns of Herbert Greenberg and the successors administrators and assigns of the Alaska Mines Corporation.

IN WITNESS WHEREOF the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be executed by its President and its corporate seal to be hereunto affixed, attested by its Secretary, [85] the day and year first above written.

HERBERT GREENBERG. (Seal)
ALASKA MINES CORPORATION.
By JAMES GAYLEY,
President.

In the presence of:

T. H. MARSHALL.

[Corporation Seal] Attest: WALTER S. REED,
Secretary.

United States of America,
Southern District of New York,
County of New York,—ss.

On this 17th day of April, 1917, before me, a notary public in and for the county of New York, personally appeared James Gayley and Walter S. Reed, each of whom is to me personally known, and known to me to be the persons who executed the foregoing instrument, the said James Gayley as the said President of the Alaska Mines Corporation, and the said Walter S. Reed as the Secretary of the Alaska Mines Cor poration, and they severally acknowledged to me that they executed the aforegoing agreement in the name of, and as the act and deed of the Alaska Mines Corporation, and by its authority, and that they so executed the same freely and voluntarily and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

[Notarial Seal] JOHN H. GEWECKE,

Notary Public King County, No. 23, Certificate filed in New York County, No. 44. Kings County Register's No. 8024, New York County Register's No. 8054.

Commission expires March 30, 1918.

State of New York,
County of New York,—ss.

No. 39,838, Series B.

I, William F. Schneider, Clerk of the County of New York [86] and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY, That John H. Gewecke whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition or proof and acknowledgment, a notary public, acting in and for the said County duly commissioned and sworn, and authorized by the laws of said State to take depositions and also acknowledgments and proofs of Deeds, or conveyances for land, tenements or hereditaments in said State of New York. That there is on file in the Clerk's office of the County of New York, a certified copy of his appointment and qualification as Notary Public of the County of Kings with his autograph signature. And further, that I am well acquainted with the handwriting of such Notary Public, and verily be-

lieve that the signature to said deposition or certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said court and county this 20th day of Apr., 1917.

[County Seal] W. F. SCHNEIDER,
Clerk.

State of New York,
County of New York,—ss.

This is to certify that on this 17th day of April, A. D. 1917, before me, William E. Conley, a Notary Public in and for the State of New York, duly commissioned and sworn, personally came Herbert Greenberg, to me known to be the individual described in and who executed the within instrument, and he acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS MY HAND and official seal, the day and year in this certificate first above written.

[Notarial Seal] W. E. CONLEY, [87]
Notary Public in and for the State of New York, Residing at 3120 Broadway, Borough of Manhattan, County of New York, Notary Public, N. Y. Co. No. 155, N. Y. Co. Register's Office No. 9155.

My commission expires March 30, 1919.

State of New York,
County of New York,—ss.

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record,

DO HEREBY CERTIFY that Wm. E. Conley, whose name is subscribed to the deposition or certificate or the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition, or proof and acknowledgment, a Notary Public in and for such County, duly commissioned and sworn, and authorized by the laws of said State to take depositions and to administer oaths to be used in any court of said State, and for general purposes; and also to take acknowledgments and proofs of deeds, of conveyances for lands, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition or certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court and County, the 20th day of Apl., 1917.

[County Seal] W. F. SCHNEIDER,
Clerk.

Recorded June 21, 1917, 9:20 A. M., at Request of H. S. Thompson.

JAMES FRAWLEY,
Recorder.

Territory of Alaska,
Second Division,
Cape Nome Precinct,—ss.

I, Hugh O'Neill, United States Commissioner for the Territory of Alaska, and ex-officio Recorder of Cape Nome Recording [88] District, for the Second Judicial Division of the said Territory of

Alaska, do hereby certify that I have compared the preceding with a certain agreement recorded in Book 202 at page 38 of the Records of said Recording District, and that the same is a true and correct transcript therefrom, and of the whole of said instrument.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal the 31st day of January, 1919.

[Seal] HUGH O'NEILL,

U. S. Commissioner and ex-officio Recorder.

(Endorsed on Back): "Hearing on defts. motion to make Geo. K. McLeod party plaintiff. #2779 in the District Court, Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corp., Defendant. Plts. Ex. "A." Filed Feb. 1, 1919. Thos. McGann, Clerk. By W. C., McG., Deputy."

And plaintiff thereupon offered Exhibit "B," which was received in evidence, without objection, which is as follows:

Plaintiff's Exhibit "B."

#60671. AGREEMENT.

THIS AGREEMENT made and entered into this 9th day of October, 1914, between GEORGE McLEOD, of Nome, Alaska, the party of the first part, and H. GREENBERG, of the same place, the party of the second part, WITNESSETH:

THAT, WHEREAS, the party of the first part heretofore commenced an action in the District Court for the District of Alaska, Second Division, en-

titled George K. McLeod, plaintiff, versus the Bessie Dredging Company, a corporation, defendant, and thereafter in said action secured and obtained judgment in the sum of thirteen thousand ($13,000.00) dollars and legal costs taxed at three hundred fifty and 81/100 ($350.81) dollars, amounting in all **[89]** to the total sum of thirteen thousand three hundred fifty and 81/100 ($13,350.81) Dollars; and

WHEREAS, thereafter the party of the first part as plaintiff in said action sold under execution in said action, according to law, all the known personal and real property of the said Bessie Dredging Company, and described as follows: All of that certain unfinished dredge together with all fittings and belongings therewith connected or belonging, situated and located on No. 2 placer claim on Holyoke Gulch in the Cape Nome Mining & Recording District, District of Alaska, Second Division. Also all of the following described placer mining claims, all of which are situated on and surrounding the third beach line north of the town of Nome in the Cape Nome Mining & Recording District, District of Alaska, to wit:

(a) The Rocksie Fraction;
(b) The Bessie Bench Claim;
(c) No. 4 placer claim on Holyoke Gulch;
(d) Crawford Fraction;
(e) No. 3 Placer claim on Holyoke Gulch;
(f) Legan Tender, commonly known as the Legal Tender;
(g) No. 2 placer claim on Holyoke Gulch;

and, thereafter, receive title thereto from the United

States Marshal, and thereafter by order of Court said sales were confirmed and the party of the first part is now the owner and in the possession of all of said personal and real property;

AND, WHEREAS, the parties hereto are desirous of selling and transferring all of said property from the party of the first part to the party of the second part on the terms hereinafter expressed;

NOW, THEREFORE, for and in consideration of the mutual promises hereinafter stated it is agreed as follows:

1. That the party of the first part hereto simultaneously herewith shall, and does make, execute and deliver to the party of the second part by bill of sale and quitclaim deed all personal and real property above described, purchased by the party of the first part under said execution sale or sales in said above-mentioned action, the receipt of proper conveyance and bill of sale [90] of which is hereby acknowledged by second party.

2. That the party of the second part hereto and his assigns will pay or cause to be paid to the party of the first part, therefor the sum of thirteen thousand ($13,000.00) dollars, the amount of said judgment, without interest, but including legal costs to the amount of Three Hundred Fifty and 81/100 ($350.81) Dollars, without interest, the said amounts to be paid from the first proceeds from the sale or the first profits from the working or mining of any of said property, personal or real, above described, and mentioned, and described in the bill of sale and quitclaim deed simultaneously made, executed and de-

livered herewith; also that the party of the second part and his assigns will pay or cause to be paid in the same manner as above provided, the amount of the claim of the Bratnober Lumber Company against the said Bessie Dredging Company in the approximate sum of twenty-four hundred fifty ($2450.00) dollars, if the party of the first part shall pay, or be compelled to pay, the said Bratnober Lumber Company's claim, including legal costs exclusive of attorney's fees; also that the party of the second part and his assigns will pay or cause to be paid in the manner as above provided, the claim of one Wm. A. Ewing, against the said Bessie Dredging Company, amounting to approximately the sum of four hundred ($400.00) dollars.

3. That profits or workings and mining for the purpose of this agreement shall be computed by deducting from the gross output the actual expenses of mining and not including interest on investment in property or equipment. That the words "proceeds from the sale of" shall be deemed to include all moneys received by second party or his assigns on executory contracts or options for the purchase of said property or any part thereof.

4. That the party of the first part hereto shall not assign this agreement nor any of his rights thereunder; nor shall the same be assignable by the party of the first part except by operation [91] of law, and at all times the payments provided herein shall be a first lien against all the personal and real property herein described, but said payments shall only be payable at such time or times as the said property,

or any part thereof, shall be mined at a profit or sold, as hereinbefore provided.

5. It is mutually understood and agreed between the parties hereto that first party, without any other compensation, shall at all times len*t* and give his assistance to the party of the second part, other than financial assistance, in any effort the party of the second part shall make to sell or mine the property herein described in order to as speedily as possible adjust and settle the claims and demands herein mentioned.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals this the day and year first above written.

GEORGE K. McLEOD. [Seal]
H. GREENBERG. [Seal]

Signed, sealed and delivered in the presence of:

IRA D. ORTON,
WILLIAM A. GILMORE.

United States of America,
Territory of Alaska,—ss.

THIS IS TO CERTIFY, that on this 9th day of October, 1914, before me, the undersigned, a Notary Public in and for the Territory of Alaska, personally appeared George K. McLeod and H. Greenberg, to me known to be the identical persons named in and who executed the within and foregoing instrument, and who acknowledged to me that they signed and sealed the same freely and voluntarily for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed my notarial seal this the day and year last above written.

[Notarial Seal] WILLIAM A. GILMORE,
Notary Public for the Territory of Alaska, Residing at Nome, Alaska.

(My commission expires July 27th, 1915.)

Recorded October 9, 1914, 4:50 P. M., at request of Wm. A. Gilmore.

JAMES FRAWLEY,
Recorder,
F. R. Cowden,
Deputy, [92]

Territory of Alaska,
Second Division,
Cape Nome Precinct,—ss.

I, Hugh O'Neill, United States Commissioner for the Territory of Alaska, and ex-officio Recorder of Cape Nome Recording District, for the Second Judicial Division of the said Territory of Alaska, do hereby certify that I have compared the preceding with a certain agreement recorded in Book 174, at page 405, of the records of said recording district, and that the same is a true and correct transcript therefrom, and of the whole of said instrument.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal the 31st day of January, 1919.

[Seal] HUGH O'NEILL,
U. S. Commissioner and ex-officio Recorder.

(Endorsed on Back): "Hearing defts. motion to make Geo. E. McLeod party plaintiff. #2779. In the District Court, Territory of Alaska, Second Division.

Herbert Greenberg, Plaintiff, vs. Alaska Mines Cor., Defendant. Plts. Ex. 'B.' Filed Feb. 1, 1919. Thos. McGann, Clerk. By W. C. McG. Deputy."

Thereupon plaintiff offered the note in evidence:

(Note received in evidence and marked Plaintiff's Exhibit "C," of which the following is a copy:) **[93]**

Plaintiff's Exhibit "C."

25,000.00, New York, April 17, 1919.

On or before January 15, 1918, for value received, the undersigned, Alaska Mines Corporation, promises to pay to Herbert Greenberg, or order, at Empire Trust Company, 120 Broadway, in the Borough of Manhattan, City of New York, the sum of twenty-five thousand dollars ($25,000) with interest at the rate of six per centum per annum, payment to be made in gold coin of the United States. If suit shall be commenced for recovery of any amount due upon this note, the undersigned agrees to pay, as attorney's fees thereon, such additional sum as the Court may adjudge reasonable.

This note is one of a series of three aggregating the sum of forty thousand dollars ($40,000), all secured by a certain mortgage, executed by the undersigned, of even date herewith, and it is hereby stipulated that if this note, or any of them, is not paid when due, and default shall continue, as provided in said mortgage, all of said notes shall become due and payable.

ALASKA MINES CORPORATION.

By JAMES GAYLEY,

President.

(Stamped): EMPIRE TRUST COMPANY. No. 34058. New York.

(Endorsed on Back): Recd. $2500.00 on a/c Apl. 17/17. (Signed) H. Greenberg.

Mr. O'NEILL.—I also offer the complaint of George K. McLoed in evidence to show wherein he swears that he is a resident of the City of New York.

Mr. CORCORAN.—That is also part of the answer?

Mr. O'NEILL.—Yes.

Mr. CORCORAN.—That is already in and not denied; these are admitted facts.

The COURT.—Already admitted.

Letter from George K. McLeod to Herbert Greenberg admitted in evidence, without objection, and marked Plaintiff's Exhibit "D," of which the following is a copy:

Plaintiff's Exhibit "D."

New York City, April 17th, 1917.

Herbert Greenberg. Esq., [94]
1476 Broadway,
New York, City.

My dear Mr. Greenberg:

In regard to agreement this day executed between us, I beg to advise that I am aware of the fact that you have given the Alaska Mines Corporation ten per cent (10%) credit on the notes secured by the mortgage, and it is agreeable to me to accept one-half of the proceeds of said note, less said deduction, until I receive the total amount.

If at any time, while the mortgage which you have receive has any value or vitality, I shall receive the

balance of Eleven Thousand ($11,000) Dollars due, with interest if any as stated in the agreement, I will re-convey to you the eleven-fortieths (11/40) of said mortgage assigned to me by our agreement.

Yours very truly,

(Signed) GEORGE K. McLEOD.

(Endorsed on Back): "Hearing on defts. motion to make George K. McLeod party plaintiff. #2779. In the District Court, Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Cor., Defendant. Plts. Ex. 'D.' Filed Feb. 1, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy."

Exemplified copy of order discharging lien of attachment admitted in evidence, without objection, and marked Plaintiff's Exhibit "E," of which the following is a copy:

Plaintiff's Exhibit "E."

No. ——.

THE PEOPLE OF THE STATE OF NEW YORK

By the Grace of God Free and Independent.

To all to whom these presents shall come or may concern, GREETING:

KNOW YE, That we having examined the records and files in the office of the Clerk of the (Seal) County of New York and Clerk of the Supreme Court of said State for said County, do find a certain order there remaining, in the words and figures following, to wit: [95]

At a Special Term of the Supreme Court, Part 1 thereof, held at the County Court House, City and State of New York, on the 27th day of September, 1918, Present: Hon. EUGENE A. PHILBIN, Justice.

No. 1260—1918.

GEORGE K. McLEOD,

Plaintiff,

vs.

HERBERT GREENBERG,

Defendant.

The defendant, Herbert Greenberg, having appeared in this action, and having given an undertaking in the sum of five thousand two hundred forty-three and 44/100 ($5,243.44) dollars to authorize the discharge of a lien of attachment obtained by the plaintiff herein on the defendant's bank account in the Hudson Trust Company, and of a certain note for twenty-five thousand ($25,000) dollars, dated April 17th, 1917, made by the Alaska Mines Corporation, due on or before January 15th, 1918, with six (6%) per cent interest, and of the interest of the defendant as represented by the Empire Trust Company, as agent for the defendant in said note made by the Alaska Mines Corporation, and having moved to discharge such attachment;

NOW, on reading and filing the affidavit of Powell Crichton, verified September 16th, 1918, in support, and the memorandum of Clarence S. Nettles in opposition to said motion, it is

ORDERED, that the attachment herein granted on the 15th day of January, 1918, against the property of the above-named Herbert Greenberg be, and the same is hereby discharged as to the [96] whole of said property, and that the Sheriff deliver to the defendant the property so attached remaining in his hands, as required by law, and the Alaska Mines Corporation is hereby discharged from said attachment in every respect, and the Empire Trust Company, as agent for the defendant, is hereby discharged in every way from its claim, and said agent, against the said Alaska Mines Corporation in respect to said note.

ENTER.

E. A. P.
J. S. C.

(Endorsed on Back): "County Clerk's Index, No. 1260, 1918. Supreme Court, County of New York. George K. McLeod, Plaintiff, against Herbert Greenberg, Defendant. Copy Order. Henry Bradshaw, Attorney for Defendant. Powell Crichton, Counsel. 120 Broadway, Borough of Manhattan, New York."

All which we have caused by these presents to be exemplified, and the seal of our said Supreme Court to be hereunto affixed.

Witness Hon. F. B. DELEHANTY, a Justice of the Supreme Court, for the County of New York, the 28th day of Sept., in the year of our Lord, one thousand nine hundred and 18, of our Independence the one hundred and 43.

[Seal] WM. F. SCHNEIDER,
Clerk.

F. B. Delehanty, a Presiding Justice at a Special Term of the Supreme Court, of the State of New York, for the County of New York, do hereby certify that William F. Schneider, whose name is subscribed to the preceding exemplification, is the Clerk of the said County of New York, and Clerk of said Supreme Court for said County, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the Seal affixed to the exemplification is the seal of our said Supreme Court, and that the attestation thereof is in due form. **[97]**

Dated New York, Sept. 28th, 1918.

F. B. DELEHANTY,

Justice of the Supreme Court of the State of New York.

State of New York,
County of New York,—ss.

I, William F. Schneider, Clerk of the Supreme Court of said State in and for the County of New York, do hereby certify that Hon. F. B. Delehanty, whose name is subscribed to the preceding certificate, is presiding Justice at a Special Term of the Supreme Court of said State in and for the County of New York, duly elected and sworn, and that the signature of said Justice to said certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this 28th day of September, 1918.

[Seal] WM. F. SCHNEIDER,

Clerk."

(Endorsed on Back): "Hearing on defts. motion to make Geo. K. McLeod party plaintiff, #2779. In the District Court Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corp., Defendant. Plts. Ex. 'E.' Filed Feb. 1, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy."

Thereupon the Court took the matter under advisement until Saturday, February 8, 1919. [98]

And be it further remembered, that thereafter, and on Saturday, the 8th day of February, 1919, at 11 o'clock A. M. of said day said above-entitled court regularly convened, and the following proceedings were had in said above-entitled cause: The Court denied the motion of the defendant upon the ground that the plaintiff was the trustee of an express trust, and, as such was authorized to sue in his own name. The defendant duly excepted to said ruling, and the exception was allowed.

"Mr. COCHRAN.—In view of the ruling of the Court, it would be necessary for the defendant to amend its answer and set up certain facts in relation to offsets of Mr. McLeod. I would not like for the case to be set for trial, Mr. O'Neill, before a week. In the meantime I can make such amendments.

The COURT.—I will set the case down for trial—

Mr. COCHRAN.—I would like to have it go beyond next Saturday.

The COURT.—It will go beyond next Saturday, that is what I am trying to do, to get a date; it will be a week from Monday. The case will be set down for trial on the 19th day of this month. If counsel

wishes time to file an amended answer he has the time until Wednesday of next week, so that opposing counsel can prepare to make any answer to it, if he wishes."

And be it further remembered, that thereafter, and upon the 19th day of February, 1919, the said above-entitled court, regularly convened and the following proceedings were had in the said above-entitled cause:

The defendant filed and presented to the Court its motion for a continuance of the trial of said cause, as follows:

"*In the District Court for the Territory of Alaska, Second Division.*

HERBERT GREENBERG,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,

Defendant.

Motion for Continuance. [99]

Comes now the defendant and moves the Court for a continuance of the trial of the above-entitled action for a period of time sufficient to enable the defendant to secure the testimony of one Myron J. Brown, the secretary of the Empire Trust Company of New York City, New York, who is a necessary witness on behalf of the defendant in the trial of said action.

This motion is made and based upon the affidavit of O. D. Cochran, hereto attached, and upon the records and files in the above-entitled court and cause.

O. D. COCHRAN,
Attorney for Defendant.

Affidavit of O. D. Cochran.

United States of America,
Territory of Alaska,—ss.

O. D. Cochran, being first duly sworn, deposes and says:

That he is the attorney for the defendant in the above-entitled action; that the Empire Trust Company is a banking corporation having its office and doing business in the City of New York, State of New York, and that Myron J. Brown is the Secretary of said company.

That said Myron J. Brown resides in said city of New York and is a necessary witness for the defendant in the defense of the foregoing entitled action; that the defendant expects to prove by said witness that on the 15th day of January, 1918, the said Empire Trust Company held for collection under authority from the plaintiff herein, the identical promissory note sued upon in this action. That on the said last-named date, Mr. Walter S. Reed, the Secretary and Treasurer of the defendant herein, tendered to the said Empire Trust Company a check drawn upon the said Empire Trust Company in favor of the said Empire Trust Company, for the sum of $23,512.50, in payment of the unpaid balance due upon said date **[100]** upon the promissory

note sued upon herein, said note being signed by the Alaska Mines Corporation, the defendant herein. That at said time the defendant, Alaska Mines Corporation, had upon deposit and subject to its check, with the Empire Trust Company, a sum of money in excess of the sum of $24,000.00. That at the time said Walter S. Reed, on behalf of the defendant herein, tendered to said Empire Trust Company its said check, the said Walter S. Reed explained to the said Myron J. Brown that said note sued upon herein was the last of a series of notes secured by the mortgage sought to be foreclosed in this action, and that as a condition of the payment of said note a satisfaction of the said mortgage was required.

That said Myron J. Brown, at said time, acting upon behalf of said Empire Trust Company, stated that it, the said Empire Trust Company, was unable to give any satisfaction of said mortgage, and for that reason declined to accept the tender of the payment of said promissory note.

That the said defendant, Alaska Mines Corporation, has, ever since the said 15th day of January, 1918, had upon deposit, subject to its check, in said Empire Trust Company in the City of New York, State of New York, a sum of money in excess of the sum of $24,000.00

That affiant believes the defendant has a substantial defense to said action upon the merits.

That said defendant cannot safely go to trial without the evidence of said Myron J. Brown.

That the continuance of the trial of said action is

not sought for delay merely, but that justice may be done in the premises.

That on account of the quarantine being duly declared and maintained, no mails were permitted to arrive or depart from Nome, Alaska, between the 5th day of November, 1918, and the 12th day of February, 1919, and that the defendant has had no opportunity to [101] secure the evidence of the said Myron J. Brown since the making up of the issue relating to the facts sought to be proven by said witness.

That the facts sought to be proven by said witness are not cumulative and cannot, to affiant's knowledge, be proven by any other person than said witness or some other officer of said Empire Trust Company, in the said city of New York.

O. D. COCHRAN.

Subscribed and sworn to before me this the 19th day of February, 1919.

[Notary Seal] LAWRENCE S. KERR,
Notary Public in and for the Territory of Alaska.

(My commission expires May 27, 1922.)

(Endorsed on back): No. 2779. In the District Court for the Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corporation, Defendant. Motion and Affidavit. Filed in the Office of the Clerk of the District Court of the Territory of Alaska, Second Division, at Nome. Feb. 19, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy. O. D. Cochran, Attorney for Defendant."

Whereupon the plaintiff through his attorney, Hugh O'Neill, requested that he have until Friday, the 21st day of February, 1919, at two o'clock P. M. to file an affidavit of resistance for such motion of continuance, which request was granted by the Court, and further proceedings continued until Friday, February the 21st, 1919, at two o'clock P. M. of said date.

And be it further remembered, that thereafter and upon the 21st day of February, 1919, at the hour of two o'clock P. M. of said date, said above-entitled court regularly convened and the following proceedings were had in said above-entitled cause:

The plaintiff, through his said attorney, filed and presented an affidavit in resistance to the motion of the defendant for a continuance of the trial of said cause, which said affidavit **[102]** is as follows:

"*In the District Court for the Territory of Alaska, Second Division.*

No. 2779.

HERBERT GREENBERG,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,

Defendant.

Affidavit of Hugh O'Neill.

Territory of Alaska,
Second Division,—ss.

Hugh O'Neill, being first duly sworn, deposes and says: That he is the attorney for the plaintiff in the above-entitled action. That on the 30th day of September, 1918, plaintiff caused the depositions of himself and William A. Gilmore to be taken at the office of O. D. Cochran, the attorney for the defendant; that on said day O. D. Cochran, Esq., counsel for the defendant, was informed and advised by affiant and William A. Gilmore that the above-entitled cause would be set for trial as soon as the Court would consent to hear the same. That defendant had the entire month of October and the early part of November, 1918, within which to sue out a commission to take the testimony of Myron J. Brown, or of any other witness that it deemed important. That had defendant forwarded a commission to take the testimony of the said Myron J. Brown, or any other person, to New York during any part of the month of October, the same would have been returned to Nome at this time, notwithstanding any quarantine regulations. That the quarantine referred to in defendant's affidavit was raised on the 15th day of February, 1919, and all of the outside mail destined to Nome has now arrived. That defendant or its counsel made no effort whatsoever to take any testimony until the above-entitled cause was called for trial, on the 19th day of February, 1919. That defendant has failed, refused and neglected to tender **[103]** the

sum of twenty-three thousand five hundred and twelve and 50/100 dollars ($23,512.50), or any other sum, into court for the payment of the note herein sued upon, or otherwise. That the testimony of Myron J. Brown, as set out in the affidavit of defendant is immaterial, for the reason that the said Walter S. Reed, the Secretary and Treasurer of the defendant herein, at the time he tendered defendant's uncertified check for the amount mentioned in said affidavit he demanded a written release of the mortgage sued upon herein, to be executed by this plaintiff and one George K. McLeod, and that said defendant refused to deliver said check, or to pay said note under any other conditions. That plaintiff then was, and at all times has been, ready, able and willing to release the mortgage sued upon herein, upon the payment of the amount due thereon. That said defendant never made at any time any lawful tender to plaintiff of the payment of said note, at said time and place or elsewhere, or at all. That the motion for a continuance made by defendant is made solely for the purpose of delaying the trial of the above-entitled cause, and embarrassing the plaintiff herein. That defendant has shown no diligence whatsoever in obtaining the testimony of the said Myron J. Brown. That said Myron J. Brown at no time said that he was unable to give any satisfaction of said mortgage, but, on the contrary, was then and there ready, able and willing to give a satisfaction of the said mortgage signed by Herbert Greenberg, and to surrender the said note, and to have a marginal release of the said mortgage entered as of record at

Nome, Alaska, upon the payment of the amount due. That defendant has no defense to the said action upon the merits, and great injustice will be done to plaintiff if this action is continued for trial.

HUGH O'NEILL.

Subscribed and sworn to before me this 21st day of February, 1919.

[Notary Seal] L. E. WEITH,

Notary Public for the Territory of Alaska, Residing at Nome.

(My commission expires Nov. 14, 1921.)" [104]

(Endorsed on back): "No. 2779. In the District Court for the Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corporation, a Corporation, Defendant. Affidavit of Hugh O'Neill. Filed in the office of the Clerk of the District Court of the Territory of Alaska, Second Division, at Nome. Feb. 21, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy. Hugh O'Neill, Attorney for Plaintiff."

And said motion for a continuance was thereupon duly argued by the Court by counsel, and the Court thereupon denied the same, to which ruling of the Court defendant duly excepted, and an exception was by the Court allowed.

Whereupon the following evidence was taken:

Mr. O'NEILL.—I now offer in evidence the deposition of HERBERT GREENBERG, the plaintiff, and taken in his own behalf, as follows:

Deposition of Herbert Greenberg, in His Own Behalf.

Testimony of witness:

Direct Examination by WILLIAM A. GILMORE.

My name is H. Greenberg, I am the plaintiff in this case; I know what the paper is you hand me; it is a note against the Alaska Mines Corporation for twenty-five thousand dollars and is the one sued upon in this foreclosure suit, it is the original note signed by the Alaska Mines Corporation by James Gayley, president. I was present when the note was signed, and I know the signature to be that of the president of the company at that time. That note bears on the back of it an endorsement of the payment of the sum of twenty-five hundred dollars, the date the note was made, April 17th, 1917, that payment was made under an agreement, and I deducted it from the note; it was a payment endorsed thereon under an agreement between myself and the Alaska Mines Corporation. There is due upon said note the sum of twenty-two thousand **[105]** five hundred dollars principal, together with interest from the date of the note at six per cent per annum, no part of the said principal or interest due upon said note has ever been paid, and the whole thereof is now due.

I expect to go outside this fall on the last boats.

Mr. GILMORE.—I offer this note in evidence and ask that it be marked Exhibit 1. (Said note being received in evidence and being marked Plaintiff's Exhibit "A," and is as follows:)

(Deposition of Herbert Greenberg.)

"$25,000.00. New York, April 17, 1917.

On or before January 15, 1918, for value received, the undersigned, Alaska Mines Corporation, promises to pay Herbert Greenberg, or order, at Empire Trust Company, 120 Broadway, in the Borough of Manhattan, City of New York, the sum of Twenty-five thousand dollars ($25,000) with interest at the rate of six per centum per annum, payment to be made in gold coin of the United States. If suit shall be commenced for recovery of any amount due upon this note, the undersigned agrees to pay, as attorney's fees thereon, such additional sum as the Court may adjudge reasonable.

This note is one of a series of three, aggregating the sum of Forty Thousand Dollars ($40,000), all secured by a certain mortgage, executed by the undersigned, of even date herewith, and it is hereby stipulated that if this note, or any of them, is not paid on the day when due, and default shall continue as provided in said mortgage, all of said notes shall become due and payable.

ALASKA MINES CORPORATION.
By JAMES GAYLEY,
President.

(Empire Trust Company)
34058.
(New York)

(Endorsed on Back): "Recd. $2500.00 on a/c Apl. 17/17. H. Greenberg. District Court, Alaska, Second Division, Greenberg vs. Alaska Mines [106] Corp. Plaintiff's identification 1, Nome, Alaska,

(Deposition of Herbert Greenberg.)
Sept. 30, 1918, L. S. Kerr, Notary Public. #2779. In the District Court Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Cor., Defendant. Plts. Ex. 'A.' Filed Feb. 21, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy."

Cross-examination by O. D. COCHRAN.

WITNESS.—(Continuing.) That note was made payable at the Empire Trust Company, 120 Broadway, in the Borough of Manhattan, City of New York. The Empire Trust Company had this note for collection on the 15th day of January, 1918, they had this note afterwards and probably until January 18th, I don't remember; I received it from them I should judge about a week after that time. I received it some time about the 22d or 24th of January, 1918.

Q. Now, referring to the attachment levied in the action brought against you by George K. McLeod, in the Supreme Court for the County of New York, you allege in your answer that you deny that said attachment and garnishment levied against certain property by the plaintiff, in said action, is in full force and effect, and deny that the same has not been released, vacated or set aside. To your own knowledge, do you know whether it is or not?

Mr. GILMORE.—Have you been advised that it was?

A. Yes, and I furnished a bond for it. The attachment is released. I was not there when the bond was furnished. I received a telegram from my at-

(Deposition of Herbert Greenberg.)
torneys in New York that the bond was given and the attachment released.

Q. If the attachment had been released it has only been released within the last few days, is that correct? A. About a week or ten days ago.

Q. It was not released at the time the defendant filed this answer, was it? **[107]**

A. It was not.

Redirect Examination by Mr. GILMORE.

Q. The other two notes mentioned in this note have been paid have they not? A. Yes, sir.

Q. This is the only note covered by the mortgage that is unpaid? A. Yes, sir.

Thereupon the plaintiff offered the further testimony contained in the redirect examination of Herbert Greenberg, which offer was objected to by Mr. Cochran, and objection sustained by the Court; said evidence so offered and rejected being as follows:

Q. Now, Mr. Cochran, asked you about a memorandum of agreement between yourself and Mr. McLeod, whereby it purports to assign to Mr. McLeod an eleven-fortieths interest in the mortgage sued upon in this case; what was the object of giving that assignment to Mr. McLeod?

Mr. COCHRAN.—I object to that as immaterial.

Mr. GILMORE.—I want to show why he gave it to him.

Mr. COCHRAN.—I most respectfully have to insist upon that objection; any written instrument speaks for itself.

(Deposition of Herbert Greenberg.)

The COURT.—Read that again. (Last question repeated.)

Mr. O'NEILL.—Before your Honor rules, I would like to be heard on that proposition.

The COURT.—Go ahead; I will hear from you both.

Mr. O'NEILL.—This is just rehashing the proposition that came up when counsel made a motion to have Mr. McLeod made a party; Mr. Cochran brought that out, about the agreement, that was entered into between McLeod and Greenberg. Mr. Gilmore wanted to show on the redirect examination of Greenberg that McLeod had no legal title to this note or to this mortgage, and that Greenberg gave McLeod an assignment of that just to protect him from an anterior obligation that had existed between Greenberg and McLeod. The court has already passed upon that [108] proposition in denying the motion of the defendant to have McLeod made a party.

The COURT.—I passed on the agreement, whether or not it made out an express trust, or not.

Mr. COCHRAN.—That is why your Honor held my objection was good.

The COURT.—The agreement is in evidence.

Mr. COCHRAN.—It is admitted in the pleadings.

Mr. O'NEILL.—It is not in evidence in this trial.

Mr. COCHRAN.—It is in evidence here.

Mr. O'NEILL.—This whole proposition cannot be rehashed at the trial of this case now; I submit this is competent evidence.

(Deposition of Herbert Greenberg.)

The COURT.—You have the agreement?

Mr. O'NEILL.—It is not proper evidence to be put in at this time; that is proper evidence in rebuttal, but Greenberg is suing upon this note. Now, Greenberg in suing upon this note has the right to show an agreement which is in the pleadings at bar, to assign a certain interest in that note, and McLeod is only made a party to the assignment by way of security; in other words, it is only pledged to him, or sort of a loan given upon it, but Mr. Greenberg is the real person in interest; that was the purpose of Mr. Gilmore in asking that question.

The COURT.—It seems to me I have passed on the question of the admissibility of that agreement, and as to what it stood for, but there is an express trust, and it spoke for itself, and it will speak for itself in rebuttal. I will sustain the objection.

A. Just to protect him, so I can pay him the money I owe him, McLeod.

Mr. O'NEILL.—I will read the next question, but it is covered by the objection.

Q. How much money did you owe McLeod at the time this mortgage was given, on the 17th day of April, 1917, on this particular deal? [109]

Mr. COCHRAN.—That is objected to as immaterial. Do I understand that all objections are to be reserved upon the stipulation, *t* to be taken at the time of the trial?

Mr. GILMORE.—Yes.

Mr. COCHRAN.—That is the same thing.

The COURT.—It will be a question of how much

(Deposition of Herbert Greenberg.)
he owed on that note that is a fact.

Mr. COCHRAN.—It is not a question of how much he owed McLeod, nothing to do with the note; that is another matter, an irrelevant matter entirely, a different transaction; your Honor held the transaction between McLeod and Greenberg was not material here.

The COURT.—All right; I misunderstood it.

Mr. COCHRAN.—It is the same thing, your Honor.

The COURT.—Very well; same ruling.

A. I paid $2,250.00 on the eleventh interest.

Q. On the eleven-fortieths?

A. Yes, sir.

Q. Leaving a balance due of about how much.

A. About $8,850.00.

Q. Was that all that was due to Mr. McLeod on the date the note fell due, January 15th, 1918?

A. $8,850.00?

Q. Yes, sir. State whether or not Mr. McLeod was indebted to you personally, for any sums of money that you claimed as against this eight thousand dollars. A. Yes, sir.

Q. How much? A. Six thousand. [110]

Q. Leaving a balance due McLeod of how much on this present assignment? A. $2,850.00.

Q. And was there more than the sum of $2,850.00 due to Mr. McLeod on January 15, 1918?

Mr. COCHRAN.—My objection runs to all these questions, that they are immaterial.

A. There was not.

(Deposition of Herbert Greenberg.)

Mr. O'NEILL.—The next question is on a different subject, and is:

Q. State whether or not you are able and ready, and have been able, ready and willing to pay McLeod the balance any time the note is paid.

Mr. COCHRAN.—That is objected to as wholly immaterial.

The COURT.—Sustained.

Mr. O'NEILL.—No objection in the deposition.

Mr. COCHRAN.—The stipulation severs that.

A. Yes, sir.

Mr. O'NEILL.—The next question will be covered by the same objection.

Q. And you are willing to pay him now?

The COURT.—Objection sustained.

A. Now; yes, sir.

Thereupon the plaintiff offered in evidence the deposition of Mr. WILLIAM A. GILMORE, a witness on behalf of the plaintiff, which was received in evidence and is as follows:

Deposition of William A. Gilmore.

My name is William A. Gilmore; my profession is that of a lawyer; I have practiced in the City of Nome since 1900. I am familiar with the pleadings in this case, and I am familiar with the fees charged for legal services in the City of Nome.

Q. What would you consider a reasonable fee for like services as the note sued upon in this case?

A. Well, in this case we have alleged a three thousand dollar fee, I think, that is very reasonable; in

(Deposition of William A. Gilmore.)
my opinion it is a very [111] reasonable attorney's fee.

WITNESS.—(Continuing.) I am familiar with the note sued upon in this case—as attorney for Mr. Greenberg I had charge of the collection of this note—on the 3d day of January, 1918, I mailed the note to the Empire Trust Company, the company named in the note as the place of payment, with certain written instructions, a copy of the instructions being herewith offered.

Mr. O'NEILL.—I offer this paper, being the one referred to by the witness.

Mr. COCHRAN.—I object to the offer on the grounds that it is irrelevant and immaterial.

The COURT.—I will admit it for what it is worth; you may have your exception.

Said paper being admitted in evidence, marked Plaintiff's Exhibit "B," and is as follows:

Plaintiff's Exhibit "B."

(COPY.)

Empire Trust Co.
120 Broadway, New York City, N. Y.

Gentlemen:

Enclosed herewith please find a promissory note of the Alaska Mines Corporation, 71 Broadway, New York City, in the principal sum of $25,000 with six per cent interest, bearing date April 17th, 1917, and due on the 15th day of January, 1918. There is an endorsement of $2,500 and is admitted received on the 17th day of April, 1917, the date of the note. The

balance with six per cent interest from said date will be due and payable on the 15th day of January, 1918, and I want you to please present the note to the Alaska Mines Corporation, on that date for payment, and if the same is not paid, please do not protest the note, but return it here to me as the note is amply secured, and I am instructed to begin foreclosure proceedings if the said note is not paid. [112]

I do not want you to wire any offers for further time on the note as none such offers will be considered. Unless the note is paid in full with interest on presentation, kindly return the same to me. If the note is paid on presentation, then please deduct your charges and deposit the balance to the credit of Herbert Greenberg in the Hudson Trust Company, 39 Broadway, New York City, and immediately wire me at my expense.

Very truly yours,
WILLIAM A. GILMORE.

WAG/L.
Enc. 1.

[Endorsed]: #2779. January 3d. In the District Court, Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corpo., Defendant. Plts. Ex. "B." Filed Feb. 21, 1919. Thos. McGann, Clerk. By W. C. McGuire, Deputy. District Court, Alaska, Second Div. Greenberg v. Alaska Mines Corp. Plaintiff's Identification No. 2. Nome, Alaska, Sept. 30, 1918. L. S. Kerr, Notary Public.

(Deposition of William A. Gilmore.)

WITNESS.—(Continuing.) I enclosed the note with the original of this letter and mailed it on this date to the Empire Trust Company. That is an exact copy of the original letter, except the original had on it my Seattle Address, and I believe it does not show in this copy. On the 15th of January I received a telegram from the Empire Trust Company—I have here the original telegram from the Empire Trust Company to myself.

Mr. O'NEILL.—I offer this paper in evidence.

Mr. COCHRAN.—The offer is objected to on the ground that the same is irrelevant and immaterial.

The COURT.—Objection is overruled.

To which ruling of the Court the defendant excepted, and an exception was allowed. Telegram received in evidence and marked Plaintiff's Exhibit "C," and is as follows: **[113]**

Plaintiff's Exhibit "C."

WESTERN UNION TELEGRAM.

Received at 113 Cherry St., Seattle, Wash. Always Open.

Jan. 15, PM. 2–40.

A 449CH 31 Coll.

Q New York, NY 45 OP 15

William A. Gilmore

Attorney 300 Central Bldg., Seattle, Wash.

Alaska Mines made formal tender balance Greenberg note at the same time demanding that satisfaction piece should accompany note complying with in-

(Deposition of William A. Gilmore.)

structions your telegram are returning note via registered mail.

EMPIRE TRUST CO.

(Endorsed on same): #2779. In the District Court, Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corp., Defendant. District Court, Alaska, 2nd Div. Greenberg vs. Alaska Mines Corp. Plaintiff's Identification No. 3. Nome, Alaska, Sept. 30, 1918. L. S. Kerr, Notary Public. (Notary Seal.) Plts. Ex. "C." Filed Feb. 21, 1919. Thos. McGann, Clerk. By W. C. McG.

WITNESS.—(Continuing.) On the same date, January 15th, 1918, which was the date of the maturity of the note, the Empire Trust Company wrote me a letter which in due course was received by me through the mail. I have here the original letter from the Empire Trust Company to myself with reference to this note.

Mr. O'NEILL.—I offer this letter in evidence.

Mr. COCHRAN.—We object to the offer as being irrelevant and immaterial.

The COURT.—The objection is overruled.

To which ruling of the Court the defendant duly excepted, and an exception was allowed.

The letter was received in evidence, marked Plaintiff's [114] Exhibit "D," and is as follows:

Plaintiff's Exhibit "D."

EMPIRE TRUST COMPANY.

Main Office:

120 Broadway.

New York, January 15th, 1918.

In re Collection No. 34058.

William A. Gilmore, Esq., Attorney
300 Central Building,
Seattle, Washington.

Dear Sir:

Referring to the Greenberg note sent us in your letter of January 3rd for collection, we beg to advise you, that we have given the Alaska Mines Corporation formal notice that this note was due and payable at this office to-day, viz., January 15th. We further wish to advise you, that we have to-day received formal tender in payment of the said note, but the Company demanded that the satisfaction of the mortgage given in connection with these notes should accompany the note now in our possession. We are enclosing herewith a copy of the letter received from the Alaska Mines Corporation accompanying their tender. Subsequent to the receipt of this tender we received your telegram. We immediately communicated the contents thereof to the Mines Corporation, but the officer in charge intimated that it had been the unanimous opinion of his associates that the company in making this payment should be amply protected by a satisfaction piece.

As there was nothing further for us to do on the

(Deposition of William A. Gilmore.)
receipt of your telegram we telegraphed you as follows:

"Alaska Mines made formal tender balance Greenberg note *a* the same time demanding that satisfaction piece should accompany note. Complying with instructions your telegram are returning note via registered mail. **[115]**

In accordance therewith we are enclosing herewith note dated April 17, 1917, in the sum of Twenty-five Thousand Dollars ($25,000.), payable January 15th, 1918, receipt of which we shall be obliged if you would acknowledge.

Yours very truly,

M. J. VANCE,

Asst. Secretary.

(Endorsed on Back): #2779. In the District Court, Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corp., Defendant. Plts. Ex. "D." Filed Feb. 21, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy. District Court, Alaska, Second Division. Greenberg vs. Alaska Mines Corporation. Plaintiff's Identification No. 4. Nome, Alaska, Sept. 30, 1918. L. S. Kerr, Notary Public. (Notary Seal)

WITNESS.—(Continuing.) And enclosed with the letter and referred to in this letter was a notice, or a copy of a notice of the Alaska Mines Corporation, served on the Empire Trust Company, with reference to the note. I have here a copy of the Empire Trust Company enclosed to me.

Mr. O'NEILL.—I offer this paper in evidence.

Mr. COCHRAN.—We object to the offer as being irrelevant and immaterial.

The COURT.—Objection overruled.

To which ruling of the Court the defendant duly excepted, and an exception was allowed. Said paper being received in evidence, marked Plaintiff's Exhibit "E" and is as follows:

Plaintiff's Exhibit "E."

COPY.

ALASKA MINES CORPORATION.
71 Broadway.
New York, January 15, 1918. **[116]**

Gentlemen:

We understand that you hold for collection a certain note executed by this Company April 17, 1917, in favor of Herbert Greenberg, in amount $25,000, and upon which $2500 has already been paid, leaving a net amount of $22,500 with interest thereon for 9 months at 6%, or a total of $23,512.50.

We beg to tender you herewith check in payment of this note and inasmuch as this is the last of a series of notes which were secured by a mortgage on certain property at Nome, Alaska, we require a satisfaction of said mortgage; furthermore, we have been advised by Mr. George K. McLeod that he is the owner of record of a certain interest in the mortgage referred to above, and we, therefore, further require that Mr. McLeod join in the execution of the

(Deposition of William A. Gilmore.)
satisfaction of said mortgage.

Yours very truly,
(Signed) WALTER S. REED,
Treasurer.

To Empire Trust Co.,
120 Broadway,
New York City.

(Endorsed): #2779. In the District Court, Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corp., Defendant. Plts. Ex. "E." Filed Feb. 21, 1919. Thos. McGann, Clerk. By W. C. McG., Dep. District Court, Alaska, Second Div. Greenberg vs. Alaska Mines Corp. Plaintiff's Identification No. 5, Nome, Alaska, Sept. 30, 1918. L. S. Kerr, Notary Public. (Notary Seal.)

WITNESS.—(Continuing.) I replied by night letter or telegram. I don't remember which, the same day I received the cable from the Empire Trust Company, the 15th day of January, 1918, notifying them to present the note and if it were not paid to return it as directed in my letter. I cannot find a copy of that cable and Mr. Greenberg does [117] not seem to have it. Thereafter and in due course of the mail the Empire Trust Company returned the note to me. The Empire Trust Company had this note in their possession up until the 17th or 18th of January, or a day or two after that date I presume. In the latter part of January, 1918, I received a letter from the law firm of Beekman, Menken & Griscom, of 52–54 Williams Street, New York.

(Deposition of William A. Gilmore.)

Q. Does that firm of attorneys represent the defendant?

A. Yes, sir. In other litigation that I have been connected with the records shows this legal firm was the law firm representing the defendant Alaska Mines Corporation, and I believe have been ever since and now are its New York counsel, and on the 24th day of January, 1918, they sent me a letter in reference to this note. I have the original letter here bearing on the account.

Mr. O'NEILL.—I offer this letter in evidence.

Mr. COCHRAN.—The evidence is objected to as being irrelevant and immaterial.

The COURT.—Objection overruled.

To which ruling of the Court the defendant excepted, and an exception was allowed. Said letter being received in evidence and marked Plaintiff's Exhibit "F," and is as follows:

Plaintiff's Exhibit "F."

BEEKMAN, MENKEN & GRISCOM,
#52–54 William Street,
New York.

January 24, 1918.

William A. Gilmore, Esq.,
300 Central Building,
Seattle, Wash.

In Re Alaska Mines Corporation.

Dear Sur:

We are attorneys for the Alaska Mines Corporation, and at their request are writing you to give you

a statement of the situation [118] with regard to the balance due, to wit, the sum of twenty-two thousand five hundred dollars and interest on the last note held by your client, Herbert Greenberg.

On January 14th the Alaska Mines Corporation wrote the Empire Trust Company stating that it had expected to make payment of said note on January 15th, but that one George K. McLeod had served a notice that Mr. Greenberg had executed a certain assignment to Mr. McLeod of a part interest in the note, together with the mortgage securing the same, and that Mr. McLeod had advised that the assignment of his interest was of record at Nome.

On January 15th the Alaska Mines Corporation tendered payment of the note at the Empire Trust Company, but required a satisfaction of the mortgage to be given jointly by Mr. Greenberg and Mr. McLeod.

On or about January 15th the Alaska Mines Corporation was served with a warrant of attachment in a case in the Supreme Court County of New York, entitled George K. McLeod, Plaintiff, against Herbert Greenberg, Defendant, in which the plaintiff seeks to recover $4,657.50 with interest.

The Alaska Mines Corporation has acted in good faith in this matter, and are willing and anxious to pay the note if the proper satisfaction of the mortgage release of Mr. McLeod's claim is secured. You, of course, realize that the corporation could not with safety ignore Mr. McLeod's claim.

We suggest that you or your client and Mr. Mc-

(Deposition of William A. Gilmore.)

Leod arrange some settlement of your differences so as to permit payment of the note and the execution and delivery to our client of a proper satisfaction piece and release.

Please advise us what you may be able to suggest to meet the situation.

Yours very truly,

BEEKMAN, MENKEN & GRISCOM. [119]

(Endorsed): #2779. In the District Court, Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corp., Defendant. Plts. Ex. "F." Filed Feb. 21, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy. District Court, Alaska, Second Div. Greenberg vs. Alaska Mines. Plaintiff's Identification No. 6 (2 pages) Nome, Alaska. Sept. 30, 1918. L. S. Kerr, Notary Public.

WITNESS.—(Continuing.) I replied to this communication received from the attorneys for the defendant on the 1st day of February, 1918, in San Francisco. I sent them a night letter a true copy of which I have here.

Mr. O'NEILL.—I offer this letter in evidence.

Mr. COCHRAN.—The offer is objected to on the grounds of being irrelevant and immaterial.

The COURT.—Objection overruled.

To which ruling of the Court defendant excepted and an exception was allowed. Said letter being received in evidence and marked Plaintiff's Exhibit "G," and is as follows:

Plaintiff's Exhibit "G."

POSTAL TELEGRAM CABLE COMPANY.

NIGHT LETTERGRAM.

San Francisco, Cal., Feb. 1, 1918.

Beekman, Menken & Griscom,

52 Williams Street, New York City, N. Y.

Your letter twenty-fourth forwarded here. Was arranging begin foreclosure proceedings to collect note believing Alaska Mines stalling on payment. Notified Empire Trust Company surrender note if paid and Greenberg would satisfy record at Nome, which is all Alaska law requires. McLeod has balance nine thousand dollars due from deal and Greenberg has counterclaim against him for six thousand dollars, leaving balance due McLeod three thousand dollars which Greenberg willing to pay. McLeod will not accept. Greenberg intends fight case through courts. Greenberg perfectly solvent and able to pay any judgment McLeod obtains. We [120] are willing to forward and surrender note with release and satisfaction in full signed by Greenberg alone upon receipt payment principal and interest to date presentation. If this is satisfactory to your company will cable Nome stop foreclosure proceedings. Answer here care Golden West Hotel.

WILLIAM A. GILMORE.

(Endorsed): #2779. In the District Court, Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corp., Defendant. Plts. Ex. "G." Filed Feb. 21, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy.

(Deposition of William A. Gilmore.)

WITNESS.—(Continuing.) On the next day I received a short cable from them the original of which I have here.

Mr. O'NEILL.—I offer this telegram in evidence.

Mr. COCHRAN.—The offer is objected to as being irrelevant and immaterial.

The COURT.—Objection overruled.

To which ruling of the Court the defendant excepted, and an exception was allowed. Telegram received in evidence and marked Plaintiff's Exhibit "H," and is as follows:

Plaintiff's Exhibit "H."

POSTAL TELEGRAM COMMERCIAL CABLES.

TELEGRAM.

New York, Feb. 2d, '18.

Wm. A. Gilmore,

Golden West Hotel, San Fran.

Your telegram relative Alaska Mines matter received unable communicate with our clients to-day but will do so first thing Tuesday and wire you.

BEEKMAN, MENKEN AND GRISCOM.

(Endorsed): #2779. In the District Court Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corp., Defendant. Plts. Ex. "H." Filed Feb. 21, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy. [121] District Court, Alaska, Second Div. Greenberg vs. Alaska Mines Corp. Plaintiff's Identification 8.

(Deposition of William A. Gilmore.)
Nome, Alaska. Sept. 30, 1918. L. S. Kerr, Notary Public.

WITNESS.—(Continuing.) And on the 6th day of February I received a night letter from them the original of which I have here.

Mr. O'NEILL.—I offer this paper in evidence.

Mr. COCHRAN.—Defendant objects to the offer as being irrelevant and immaterial.

The COURT.—Objection overruled.

To which ruling of the Court the defendant excepted and an exception was allowed. Said paper being received in evidence and marked Plaintiff's Exhibit "I," which is as follows:

Plaintiff's Exhibit "I."

NIGHT LETTERGRAM.

New York, Feb. 6, '18.

William A. Gilmore,
Golden West Hotel, San Fran.

Alaska Mines Company at all times ready and willing to pay Greenberg note but even assuming that it should disregard formal notice assignment served by McLeod attachment referred to in our letter Jany twenty-fourth acts as absolute injunction under laws of this state and disregard thereof would entail severe penalties not to mention possible liability for any judgment up to the amount of the note recovered by McLeod in the action here. We stand ready to do anything possible to facilitate payment of note but under all circumstances we are placed in a most embarrassing position. If you have any suggestions as

(Deposition of William A. Gilmore.)

to a course which would permit our client to make payment and at the same time properly protect his interest please advise us.

BEEKMAN, MENKEN & GRISCOM.

[Endorsed]: #2779. In the District Court Territory of Alaska, Second Division. **[122]** Herbert Greenberg, Plaintiff, vs. Alaska Mines Corp., Defendant. Plts. Ex. "I." Filed Feb. 21, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy. District Court, Alaska, Second Div. Greenberg vs. Alaska Mines Corp. Plaintiff's Identification No. 9, Nome Alaska. Sept. 30, 1918. L. S. Kerr, Notary Public.

WITNESS.—(Continuing.) On the next day, February 7th, 1918, I replied to this wire, and sent them either a night letter or a day telegram, the correct copy of which I have here.

Mr. O'NEILL.—I offer this paper in evidence.

Mr. COCHRAN.—Defendant objects to the offer as being irrelevant and immaterial.

The COURT.—Objection overruled.

To which ruling of the Court the defendant excepted and an exception was allowed. Said paper being received in evidence and marked Plaintiff's Exhibit "J," and being as follows:

Plaintiff's Exhibit "J."

WESTERN UNION TELEGRAM.

Messrs. Beekman, Menken & Griscom,
Attorneys at Law,
52 Williams Street, New York, N. Y.

Answering your telegram February sixth if your

(Deposition of William A. Gilmore.)
clients willing comply with all terms my previous telegram suggest I will advise Greenberg to agree on deposit sum of ten thousand dollars of proceeds of note with Empire Trust Company your city to guarantee payment any judgment McLeod obtains against Greenberg. If this is satisfactory wire and we will forward note with satisfaction of mortgage with instructions to Empire Trust Company accordingly.

WILLIAM A. GILMORE.

[Endorsed]: #2779. In the District Court, Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corp. Plts. Ex. "J." Filed Feb. 21, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy. [123]

(Endorsed on Back): District Court, Alaska, 2d Div., Greenberg vs. Alaska Mines Corp., Plaintiff's Identification No. 10. Nome, Alaska, Sept. 30, 1918. L. S. Kerr, Notary Public.

WITNESS.—(Continuing.) On the eighth day of February, 1918, I received a telegram from them, the original of which I have here.

Mr. O'NEILL.—I offer this telegram in evidence.

Mr. COCHRAN.—We object to the telegram as being irrelevant and immaterial.

The COURT.—Objection overruled.

To which ruling of the Court the defendant duly excepted and an exception was allowed. Said telegram being received in evidence and marked Plaintiff's Exhibit "K," and is as follows.

(Deposition of William A. Gilmore.)

Plaintiff's Exhibit "K."

NIGHT LETTERGRAM.

New York, Feb. 8–18.

William A. Gilmore

Golden West Hotel, San Francisco.

Your wire will communicate with McLeod and endeavor to arrange acceptance your proposition and wire you result, possible some delay account two holidays here next week.

BEEKMAN, MENKEN & GRISCOM.

(Endorsed): #2779. In the District Court Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff vs. Alaska Mines Corp., Defendant. Plts. Ex. "K." Filed Feb. 21, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy. District Court, Alaska, 2d Div. Greenberg vs. Alaska Mines Corp. Plaintiff's Identification No. 11, Nome, Alaska. Sept. 30, 1918. L. S. Kerr, Notary Public.

WITNESS.—(Continuing.) I don't believe I heard anything more from them until the 20th of February, when I received a telegram from them the [124] original of which I have here.

Mr. O'NEILL.—I offer this telegram in evidence.

Mr. COCHRAN.—We object to the offer on the grounds that it is irrelevant and immaterial.

The COURT.—Objection overruled.

To which ruling of the Court the defendant duly excepted and an exception was allowed. Said telegram being received in evidence, marked Plaintiff's Exhibit "L" and is as follows:

(Deposition of William A. Gilmore.)

Plaintiff's Exhibit "L."

WESTERN UNION TELEGRAM.

Received at Flood Bldg., 8 Powell St. & 890 Market St., San Francisco.

Feb. 20, 1918.

Wm. A. Gilmore

Golden West Hotel, San Francisco.

McLeod away from city just returned refuses to release attachment.

BEEKMAN, MENKEN & GRISCOM.

(Endorsed): #2779. In the District Court, Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corp., Defendant. Plts. Ex. "L." Filed Feb. 21, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy. District Court, Alaska, 2d Div. Greenberg vs. Alaska Mines Corp. For identification, Pltffs. Ex. No. 12, Nome, Alaska, Sept. 30, 1918. L. S. Kerr, Notary Public.

WITNESS.—(Continuing.) In their telegram of February 8th, they say on account of certain holidays intervening they desired time—something to that effect, and they took approximately two weeks, pretty near, before they replied, and replied on the 20th, and after I received their telegram of the 20th I either cabled them or wrote them a letter that I considered the matter as closed and their answer as final, and that I expected to begin foreclosure proceedings, but I have [125] mislaid the copy of the letter or telegram, whichever it was, and cannot find it, neither has Mr. Greenberg been able to find

(Deposition of William A. Gilmore.)
it among his papers. After this, I think I also received another telegram from them, stating that they would like to make some adjustment of the matter, if possible, and wanting to know if there was anything further that I could suggest. I haven't that telegram here, neither has Mr. Greenberg been able to find it, but any way they said they would like to make some adjustment, if it could be done. I wrote and told them that I considered we had made a very fair offer when we offered to put up ten thousand dollars of the proceeds of the note to guarantee payment of any judgment that might be obtained. I then waited two months and then cabled Mr. Hobbes to commence this suit in April some time.

Testimony of Morton Powell, for Plaintiff.

MORTON POWELL, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

I am not the agent of the Alaska Mines Corporation in Alaska. I do not know who is. I have worked for the Alaska Mines Corporation during the last summer out on this dredge.

Q. Is there any machinery on the ground adjacent to the dredge? A. Yes, sir.

Q. What is the character of that machinery?

A. It is equipment for a dredge, buckets, ladders and stackers.

Q. That machinery was brought there for the purpose of putting up this dredge? A. Yes, sir.

Q. And is still there on the ground?

A. Still on the ground.

Q. Adjacent to the dredge? A. Yes, sir. [126]

Testimony of E. W. Burroughs, for Plaintiff.

E. W. BURROUGHS, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

I am employed by the Alaska Lighterage & Commercial Company. I receive freight directed to the Alaska Mines Corporation. The character of that freight received was mining machinery for a dredge, the machinery was delivered to the Alaska Mines Corporation, it was dredging machinery. I could not say as to where the machinery was taken. I weighed a great many of the loads taken out; it was hauled by C. L. Ross.

Testimony of Hugh O'Neill, for Plaintiff.

HUGH O'NEILL, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

I am one of the attorneys for Herbert Greenberg, and I hold this note for Twenty-five Thousand Dollars as attorney for Herbert Greenberg, and it is payable by the Alaska Mines Corporation. No sum of money has been paid upon this note except the sum of Twenty-five Hundred Dollars which is endorsed upon the note. Mr. Greenberg has been endeavoring to secure the payment of this note and has instituted for the foreclosure of the mortgage which was made at that time to secure the payment of the note. I am of the opinion that Three thousand dollars is a reasonable attorney's fee for the foreclosure of the mortgage.

(Testimony of Hugh O'Neill.)

Cross-examination.

(By Mr. COCHRAN.)

Q. You think that Three Thousand Dollars is a reasonable attorney's fee for the commencement and prosecution of this foreclosure?

A. To final judgment. Yes, I think so.

Q. From commencement to final judgment? [127]

A. Yes, sir; taking everything as a whole, before I get through with the suit, that Three Thousand Dollars will be a reasonable attorney's fee for Mr. Gilmore and myself.

(Witness excused.)

Mr. O'NEILL.—I now offer in evidence the exemplified copy of the order of the release of the judgment.

The COURT.—It may be received.

Said order of release received in evidence and marked Plaintiff's Exhibit "O," and is as follows:

Plaintiff's Exhibit "O."

No. ——.

THE PEOPLE OF THE STATE OF NEW YORK.

By the Grace of God Free and Independent.

To All to Whom These Presents Shall Come or May Concern:

KNOW YE, that we having examined the records and files in the office of the Clerk of the County of New York, and Clerk of the Supreme Court of said State for said County, do find there a certain order

(Seal)

remaining, in the words and figures following, to wit:

"At a Special Term of the Supreme Court, Part 1 thereof, held at the County Court House, City and State of New York, on the 27th day of September, 1918. Present, Hon. EUGENE A. PHILBIN, Justice.

No. 1260–1918.

GEORGE K. McLEOD,

Plaintiff,

vs.

HERBERT GREENBERG,

Defendant.

The defendant, Herbert Greenberg, having appeared in **[128]** this action, and having given an undertaking in the sum of five thousand two hundred forty-three and 44/100 ($5,243.44) dollars to authorize the discharge of a lien of attachment obtained by the plaintiff herein on the defendant's bank account in the Hudson Trust Company, and of a certain note for twenty-five thousand ($25,000) dollars, dated April 17th, 1917, made by the Alaska Mines Corporation, due on or before January 15th, 1918, with six (6%) per cent interest, and of the interest of the defendant as represented by the Empire Trust Company, as agent for the defendant, in said note made by the Alaska Mines Corporation, and having moved to discharge such attachment.

NOW, on reading and filing the affidavit of Powell Crichton, verified September 16th, 1918, in support, and the memorandum of Clarence S. Nettles in opposition to said motion, it is

ORDERED, that the attachment herein granted on the 15th day of January, 1918, against the property of the above-named Herbert Greenberg be, and the same hereby is discharged as to the whole of said property, and that the Sheriff deliver to the defendant the property so attached remaining in his hands, as required by law, and the Alaska Mines Corporation is hereby discharged from said attachment in every respect, and the Empire Trust Company, as agent for the defendant, is hereby discharged in every way from its claim, as said agent, against the said Alaska Mines Corporation, in respect to said note.

ENTER.

E. A. P.,
J. S. C.

(Endorsed on Back): County Clerk's Index, No. 1260–1918, Supreme Court County of New York, George K. McLeod, Plaintiff against Herbert Greenberg, Defendant. Copy Order. Henry Bradshaw, Attorney [129] for Defendant, Powell Crichton, Counsel. 120 Broadway, Borough of Manhattan, New York. Service of a copy of the within is this day admitted. Dated New York, *191*. Attorney for ———.

All which we have caused by these presents to be exemplified, and the Seal of our said Supreme Court to be hereto affixed. Witness: Hon. F. B. Delehanty, a Justice of the Supreme Court for the County of

New York, the 28th day of Sept., in the year of our Lord One thousand nine hundred and eighteen, of our Independence the one hundred and 45.

[Seal] WM. F. SCHNEIDER,
Clerk.

F. B. Delehanty, a Presiding Justice at a Special Term of the Supreme Court of the State of New York for the County of New York, do hereby certify that William F. Schneider, whose name is susbcribed to the preceding exemplification, is the Clerk of the said County of New York, and Clerk of said Supreme Court for said County duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the Seal affixed to the exemplification is the seal of our said Supreme Court, and that the attestation thereof is in due form.

Dated New York, Sept. 28th, 1918.

F. B. DELEHANTY,
Justice of the Supreme Court of the State of New York.

State of New York,
County of New York,—ss.

I, William F. Schneider, Clerk of the Supreme Court of said State in and for the County of New York, do hereby certify that Hon. F. B. Delehanty, whose name is subscribed to the preceding certificate, is Presiding Justice at a Special Term of the Supreme Court of said State in and for the County of New York, [130] duly elected and sworn, and that the signature of said Justice to said certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court, this 28th day of Sept. 1918.

[Seal] WM. F. SCHNEIDER,
Clerk.

(Endorsed on Back): #2779. In the District Court, Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corp. Defendant. Plts. Ex. "O." Filed Feb. 21, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy. Hearing on defts. motion to make George K. McLeod, party plaintiff. #2779. In the District Court, Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corp. Defendant. Plts. Ex. "E." Filed Feb. 1, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy.

Testimony of O. D. Cochran, for Plaintiff.

O. D. COCHRAN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

(By Mr. O'NEILL.)

Q. Do you recall a conversation between Mr. Greenberg, Mr. Gilmore and myself in your office with reference to this attachment that was some time prior to that time pending against this note?

A. At the time of taking the depositions?

Q. Yes, at the time of taking the depositions.

A. Yes, the matter was brought up in the taking of the depositions; I asked something myself about that.

Q. Do you remember the discussion prior to the

(Testimony of O. D. Cochran.)

taking of the depositions that Mr. Greenberg told you the attachment was released, that he put up a bond, and had received a wire to that effect?

A. I don't know whether prior, but there was such a conversation, I think at that time in my office between yourself—I won't [131] say who told me, either you or Mr. Gilmore or Mr. Greenberg; maybe all of you.

Q. That is all, Mr. Cochran.

The WITNESS.—Prior to that time I had never heard of the attachment alleged in the pleadings in New York being released.

Q. I understand you did not.

A. And I have never received any further notice of its having been released until you exhibited to me the exemplified copies of the order of release in the New York courts.

(Witness excused.)

Plaintiff rests.

Mr. COCHRAN.—The defendant now moves the Court to dismiss the complaint of the plaintiff for the reason and upon the ground that it is shown by the pleadings and by the evidence that one George K. McLeod is a necessary party to this action, and necessary to a complete determination of the action, being an assignee under contract of eleven-fortieths interest in the identical note sued upon and the mortgage sought to be foreclosed in this action.

The COURT.—Had I agreed with counsel I would have granted your motion to make McLeod a party. The motion is overruled. Anything further?

To which ruling of the Court the defendant duly excepted and an exception was allowed.

Mr. COCHRAN.—I want to further move to dismiss the complaint of the plaintiff because it is shown upon the face of the note that the note is payable at the Empire Trust Company in the city of New York, and that tender was made, at the date that the same became due, to the Empire Trust Company of the amount due, which tender was refused by the Empire Trust Company by reason of its failure and inability to give the satisfaction of the mortgage sought to be foreclosed; and for the further [132] reason of an attachment being levied by one George K. McLeod in an action pending in the Supreme Court of the State of New York, for the County of New York, against the property of the plaintiff, Herbert Greenberg, in the hands of the defendant, Alaska Mines Corporation.

Which motion was by the Court overruled. To which ruling of the Court the defendant duly excepted, and an exception was allowed.

The COURT.—I think Three Thousand Dollars is too much for attorney's fees. I think ten per cent of the principal and interest would be sufficient, and you may compute your attorney's fee accordingly. Judgment will be in favor of the plaintiff and you may draw your finding and conclusions along that line.

Thereafter and on the 15th day of March, 1919, the Court duly signed its findings of fact and conclusions of law, and a decree herein, and the same

were duly filed in said court and cause, to the signing of which said findings of fact and conclusions of law and decree the defendant duly excepted, and an exception was allowed.

And now, in furtherance of justice, and that right may be done in the premises, the defendant presents the foregoing bill of exceptions, and prays that the same may be settled and allowed as the bill of exceptions in the above-entitled cause.

O. D. COCHRAN,
Attorney for Defendant. [133]

The foregoing bill of exceptions having been duly served, filed and presented within the time prescribed by law and the orders of this Court, and having been this day in open court agreed to by counsel for plaintiff and defendant; and the same being found by the Court to be full, true and correct, said bill of exceptions is hereby settled and allowed.

Done in open court this 12th day of May, 1919.

WM. A. HOLZHEIMER,
District Judge.

Service by receipt of a copy of the foregoing proposed bill of exceptions admitted this the 12 day of May, 1919.

HUGH O'NEILL,
Attorney for Plaintiff. [134]

[Endorsed]: No. 2779. In the District Court for the Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corporation, a Corporation, Defendant. Bill of Exceptions. Filed in the Office of the Clerk of the District Court of the Territory of Alaska, Second Division, at Nome. May

12, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy. O. D. Cochran, Attorney or Defendant. Orders & Judgments, Vol. 11, p. 545. C. [135]

In the District Court for the Territory of Alaska, Second Division.

No. 2779.

HERBERT GREENBERG,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,

Defendant.

Petition for an Order Allowing Appeal.

Comes now the defendant, Alaska Mines Corporation, a corporation, and feeling itself aggrieved by the final judgment and decree made and entered in the above-entitled cause on the 15th day of March, 1919, in favor of the plaintiff and against the defendant, and hereby appeals from said final judgment and decree and from the whole and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that this, its appeal, may be allowed and that a transcript of the records and proceedings upon which said judgment and decree were made may be duly authenticated and sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that upon the giving of a supersedeas bond in the sum of twenty thousand dollars as hereinbefore fixed by an order of this Court that

execution of said judgment and decree and all further proceedings of this Court thereon be superseded and stayed.

Dated at Nome, Alaska, this 12th day of May, 1919. **[136]**

O. D. COCHRAN,
Attorney for Defendant.

Service of the above and foregoing petition for an order allowing an appeal is acknowledged by receipt of a copy thereof this 12th day of May, 1919.

HUGH O'NEILL,
Attorney for Plaintiff.

[Endorsed]: No. 2779. In the District Court for the Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corporation, a Corporation, Defendant. Petition for an Order Allowing Appeal. Filed in the Office of the Clerk of the District Court of the Territory of Alaska, Second Division, at Nome. May 12, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy. O. D. Cochran, Attorney for Defendant. **[137]**

In the District Court for the Territory of Alaska, Second Division.

No. 2779.

HERBERT GREENBERG,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,

Defendant.

Order Allowing Appeal.

Upon motion of O. D. Cochran, attorney for the above-named defendant, it is ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment and decree heretofore filed and entered herein on the 15th day of March, 1919, be, and the same is hereby allowed, and that a certified transcript of the records, testimony, exhibits, motions, orders, and all proceedings herein be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit. And it is further

ORDERED, that upon the defendant Alaska Mines Corporation giving the bond as heretofore fixed by the Court in the sum of Twenty Thousand Dollars, that all proceedings in this court be superseded and stayed.

Done in open court this 12th day of May, 1919.

WM. A. HOLZHEIMER,
District Judge.

Service of the above order admitted by receipt of a copy thereof, this 12th day of May, 1919.

HUGH O'NEILL,
Attorney for Plaintiff.

[Endorsed]: No. 2779. In the District Court for the Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corporation, a Corporation, Defendant. Order Allowing Appeal. Filed in the Office of the Clerk of the District Court of the Territory of Alaska, Second Division, at Nome. May 12, 1919. Thos. McGann, Clerk. By W. C.

McG., Deputy, O. D. Cochran, [138] Attorney for Defendant. Orders & Judgments, Vol. 11, p. 541. C. [139]

In the District Court for the Territory of Alaska, Second Division.

No. 2779.

HERBERT GREENBERG,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,

Defendant.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, the Alaska Mines Corporation, a corporation, the defendant named in the foregoing entitled action as principal, and the National Surety Company, a corporation organized and existing under the laws of the State of New York, surety, are held and firmly bound unto the plaintiff Herbert Greenberg above named, in the sum of Twenty Thousand Dollars, to be paid to the said plaintiff Herbert Greenberg, his heirs or assigns, and to the payment of which well and truly to be made, we bind ourselves and each of ourselves jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12th day of May, 1919.

The condition of the above undertaking and obligations is such that,

WHEREAS the above-named defendant Alaska Mines Corporation has filed its petition for an appeal and have [140] taken an appeal in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and decree in the above-entitled cause rendered by the above-entitled District Court for the Territory of Alaska, Second Division, on the 15th day of March, 1919; and

WHEREAS, the said defendant desires to secure the plaintiff in the payment of his costs and all damages which he may suffer by reason of such appeal, and also desires to have execution of such judgment and decree, and all other proceedings in said action superseded and stayed pending the final determination of said action upon appeal,

NOW, THEREFORE, if the above-named defendant Alaska Mines Corporation, a corporation, shall prosecute said appeal to effect, and answer all costs and damages if it fails to make good its said appeal, and shall pay or cause to be paid to the said plaintiff, his executors, administrators or assigns, all damages which he shall suffer by reason of such supersedeas and stay of execution, if the same shall be wrongful or without sufficient cause, then this obligation shall be void, otherwise to remain in full force and virtue.

Dated at Nome, in the Territory of Alaska, this 12th day of May, 1919.

ALASKA MINES CORPORATION,
Principal.
By O. D. COCHRAN,
Its Agent and Attorney.

[Seal of National Surety Company]

NATIONAL SURETY COMPANY,
Surety,
By G. R. JACKSON,
Its Attorney in Fact. [141]

United States of America,
Territory of Alaska,—ss.

On this, the 12th day of May, 1919, before me personally came G. R. Jackson, to me known and he being by me first duly sworn did depose and say:

That he resides in the town of Nome, Territory of Alaska; that he is the attorney in fact of National Surety Company, a corporation described in and who executed the foregoing undertaking as a surety thereon; that he is attorney in fact of said National Surety Company under special power of attorney duly executed by the said National Surety Company on the 16th day of April, 1919, and is authorized and empowered to execute the foregoing undertaking and signed the name of the National Surety Company thereto as a surety thereon; that he knows the seal of said corporation; that the seal affixed to the said undertaking is such corporate seal; that it was so affixed by affiant who is duly authorized to affix the same thereto.

G. R. JACKSON,

Subscribed and sworn to before me this 12th day of May, 1919.

[Notarial Seal] O. D. COCHRAN,
Notary Public in and for the Territory of Alaska.

(My commission expires on the 4th day of August, 1919.) **[142]**

Order Approving Bond.

The above and foregoing undertaking is hereby approved this 12th day of May, 1919, and execution and all other proceedings in said action are hereby superseded and stayed pending the final determination of this action, upon appeal.

WM. A. HOLZHEIMER,
District Judge.

[Endorsed]: No. 2779. In the District Court for the Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corporation, a Corporation, Defendant. Undertaking on Appeal. Filed in the Office of the Clerk of the District Court of the Territory of Alaska, Second Division, at Nome. May 12, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy. O. D. Cochran, Attorney for Defendant. **[143]**

In the District Court for the Territory of Alaska, Second Division.

No. 2779.

HERBERT GREENBERG,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,

Defendant.

Assignment of Errors.

Comes now the above-named defendant Alaska Mines Corporation, and files the following assignment of errors upon which it will rely in the prosecution of its appeal in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit:

I.

The Court erred in overruling defendant's demurrer to the complaint of the plaintiff filed in said cause.

II.

The Court erred in refusing and denying the motion of the defendant to make George K. McLeod a party to the said action.

III.

The Court erred and committed an abuse of discretion in denying the motion of defendant for a continuance of the trial of said action.

IV.

The Court erred in denying the motion of the defendant [144] made at the close of plaintiff's testimony to dismiss the complaint of the plaintiff for the reason and upon the grounds that it was shown by the pleadings and by the evidence that one George K. McLeod was a necessary party to this action and necessary to the complete determination of the action, being an assignee under contract of eleven-fortieths interest in the identical note sued upon and the mortgage sought to be foreclosed in this action.

V.

The Court erred in denying the motion of the de-

fendant to dismiss the complaint of the plaintiff because it was shown upon the face of the note that the note was payable at the Empire Trust Company in the city of New York and that tender was made on the date that the same became due, to the Empire Trust Company, of the amount due, which tender was refused by the Empire Trust Company by reason of its failure and inability to give the satisfaction of the mortgage sought to be foreclosed, and for the further reason that an attachment had been levied by one George K. McLeod in an action pending in the Supreme Court in the City of New York, for the County of New York, against the property of the plaintiff Herbert Greenberg in the hands of the Alaska Mines Corporation.

VI.

The Court erred in directing that ten per cent of the amount of principal and interest due upon *said should* be computed as attorney's fees in said action, because it is shown by the records and pleadings that at the time of the commencement of this action an attachment was levied against the amount due upon the identical promissory note sued upon **[145]** in this action in the hands of the Alaska Mines Corporation and in the hands of the Empire Trust Company, and that said attachment so levied was not released until the 27th day of September, 1918, and because said action having been prematurely commenced, no attorney's fees should be allowed in any event until the release of such attachment on the 27th day of September, 1918, and because there is no evidence as to the amount of a reasonable attor-

ney's fee in this action for the prosecution thereof after the date of the release of said attachment.

VII.

The Court erred in making its finding number "X" as follows:

> "The Court finds that the plaintiff is the lawful owner and holder of said mortgage and said promissory note designated Schedule 'A.–3.' "

VIII.

The Court erred in making its finding numbered "XII" as follows:

> "The Court finds there is due, owing and unpaid from defendant to plaintiff, in principal and interest, on said promissory note designated as Schedule 'A.–3,' the sum of Twenty-four Thousand Nine Hundred and Ninety Dollars ($24,-990.00)."

IX.

The Court erred in making its finding numbered "XIII" as follows:

> "The Court finds that the sum of Twenty-four Hundred and Ninety-nine Dollars ($2499.00) is a reasonable sum to be allowed for attorney's fees for the commencement and prosecution **[146]** of this action to foreclose said mortgage."

X.

The Court erred in making its fin*g*ing numbered "XVIII" as follows:

> "The Court finds that George K. McLeod has no interest in the note and mortgage sued upon in this action, and that the said George K. Mc-

Leod is not a proper or necessary party to this action."

XI.

The Court erred in making its finding numbered "XX" as follows:

"The Court finds that the defendant never made any lawful tender to plaintiff of payment of said note on the 15th day of January, 1918, or at any time, or at all."

XII.

The Court erred in making its finding numbered "XXIII" as follows:

"The Court finds that each and all of the allegations and averments in the first cause of action in plaintiff's complaint contained are true and correct."

XIII.

The Court erred in making its conclusions of law numbered "I" as follows:

"That the plaintiff, Herbert Greenberg, is entitled to a judgment and decree against the defendant, Alaska Mines Corporation, a corporation, for the sum of Twenty-four Thousand Nine Hundred and Ninety Dollars ($24,990.00), with interest at the rate of eight per cent per annum from February 21st, 1919, being the date of the entry of decree herein, together with the **[147]** sum of Twenty-four Hundred and Ninety-nine Dollars ($2499.00) as attorney's fees in this action, and costs of suit taxed at the sum of $——."

XIV.

The Court erred in making its conclusion of law numbered "II" as follows:

> "That the said judgment in favor of plaintiff, Herbert Greenberg, be adjudged a prior lien by virtue of the said mortgage upon all the real and personal property described therein, and that said mortgage therein mentioned be foreclosed in the manner provided by law, and the real and personal property therein described sold in the manner provided by law, and the proceeds thereof applied to the payment of the amount found due to the plaintiff on the said promissory note designated as Schedule 'A-3,' together with interest, attorney's fees and costs, and that any surplus be delivered to the said defendant."

XV.

The Court erred in making its conclusions of law numbered "III" as follows:

> "That by virtue of the agreement between plaintiff herein and one George K. McLeod, described in paragraph XIV of defendant's answer and annexed thereto and marked Exhibit 'A' attached to Exhibit 'C,' plaintiff became a trustee of an express trust, and may sue without joining with him the person for whose benefit the action is prosecuted."

because that if the plaintiff did in fact and in law become a trustee of an express trust pursuant to any agreement with said [148] George K. McLeod, then such trust was terminated by the said George

K. McLeod long prior to the commencement of this action.

XVI.

The Court erred in making its conclusion of law numbered "IV" as follows:

> "That no lawful tender of the amount due upon said note and mortgage sued upon herein has ever been made by defendant to plaintiff."

XVII.

The Court erred in ordering, adjudging and decreeing that the plaintiff Herbert Greenberg do have and recover of and from the defendant Alaska Mines Corporation, a corporation, the sum of Twenty-four Thousand Nine Hundred and Ninety ($24,990.00) Dollars, with interest at the rate of eight per cent per annum from the 21st day of February, 1919, together with the sum of Twenty-four Hundred Ninety-nine ($2499.00) Dollars attorney's fees and costs of suit; and that the real and personal property described in said mortgage be sold to satisfy said judgment and decree.

WHEREFORE the said defendant prays that the said judgment and decree of said District Court for the Territory of Alaska, Second Division, be reversed and set aside.

O. D. COCHRAN,
Attorney for Defendant.

Due service of the within assignment of errors is hereby acknowledged at Nome, Alaska, by receipt of a copy thereof, this 12th day of May, 1919.

HUGH O'NEILL,
Attorney for Plaintiff.

[Endorsed]: No. 2779. In the District Court for the Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corporation, a Corporation, Defendant. Assignment of Errors. Filed in the Office of the Clerk of the District Court of the Territory of Alaska, Second Division at Nome. May 12, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy. O. D. Cochran, Attorney for Defendant. [**149**]

In the District Court for the Territory of Alaska, Second Division.

No. 2779.

HERBERT GREENBERG,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,

Defendant.

Order Extending Time to Docket Appeal.

Good cause appearing therefor, and upon motion of O. D. Cochran, attorney for the defendant in the above-entitled action, it is hereby ordered that the time for filing and docketing the transcript and records on the appeal in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, is hereby extended to September 1st, 1919.

Done in open court this the 7th day of June, 1919.

WM. A. HOLZHEIMER,

District Judge.

No. 2779. In the District Court for the Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corporation, Defendant. Order Extending Time to Docket Appeal. Filed in the Office of the Clerk of the District Court of the Territory of Alaska, Second Division at Nome. Jun. 7, 1919. Thos. McGann, Clerk. By W. C. McG., Deputy. O. D. Cochran, Attorney for Defendant. Orders & Judgments, Vol. 11, p. 541. C. **[150]**

In the District Court for the Territory of Alaska, Second Division.

No. 2779.

HERBERT GREENBERG,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Thos. McGann, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 154, both inclusive, are a true and exact transcript of the complaint, demurrer, court minutes, June 15, 1918 (over-

ruling demurrer), answer as amended by interlineation, court minutes February 15, 1919 (granting leave to amend the original answer by interlineation, by the clerk), amended reply, findings of fact and conclusions of law, judgment, bill of exceptions, petition for an order allowing appeal, order allowing appeal, undertaking on appeal, assignment of errors and order extending time to docket appeal, in the case of Herbert Greenberg, Plaintiff, vs. Alaska Mines Corporation, a Corporation, Defendant, No. 2779, this Court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the original Citation on Appeal in the above-entitled cause attached to this transcript.

Cost of transcript, $66.80. [151]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 21st day of July, A. D. 1919.

[Seal] THOS. McGANN,
Clerk.

By ——————————
Deputy Clerk. [152]

In the District Court for the Territory of Alaska, Second Division.

No. 2779.

HERBERT GREENBERG,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,

Defendant.

Citation on Appeal.

United States of America,
Territory of Alaska,—ss.

The President of the United States of America, to Herbert Greenberg, the Plaintiff Above Named, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this citation, on the 11th day of June, 1919, pursuant to an order allowing an appeal, entered in the office of the Clerk of the District Court for the Territory of Alaska, Second Division, from the final decree and judgment filed and entered therein on the 15th day of March, 1919, in that certain suit wherein you, the said Herbert Greenberg, are the plaintiff and the Alaska Mines Corporation, a corporation, is defendant, to show cause, if any there be, why the said final decree and **[153]** judg-

ment rendered against the said defendant as in said order allowing appeal mentioned should not be granted, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 12th day of May, A. D. 1919, of the Independence of the United States, the one hundredth and forty-fourth.

WM. A. HOLZHEIMER,
District Judge.

ATTEST my hand and the seal of the District Court for the Territory of Alaska, Second Division, at the clerk's office, Nome, Alaska, this 12th day of May, 1919.

[Seal] THOS. McGANN,
Clerk of the District Court for the Territory of Alaska, Second Division.

Service of the above and foregoing citation acknowledged by receipt of a copy thereof, this 12th day of May, 1919.

HUGH O'NEILL,
Attorney for Plaintiff. [154]

[Endorsed]: No. 2779. In the District Court for the Territory of Alaska, Second Division. Herbert Greenberg, Plaintiff, vs. Alaska Mines Corporation, a Corporation, Defendant. Citation on Appeal.

[Endorsed]: No. 3378. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Mines Corporation, a Corporation, Appellant, vs. Herbert Greenberg, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Second Division.

Filed August 15, 1919.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

NO. 3378

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

14

ALASKA MINES CORPORATION, a Corporation,
Appellant,

— vs. —

HERBERT GREENBERG,
Appellee.

No. 3378

Upon Appeal from the United States District Court for the Territory of Alaska, Second Division

BRIEF OF APPELLANT

W. H. BOGLE,
F. T. MERRITT,
LAWRENCE BOGLE,
O. D. COCHRAN,
Attorneys for Appellant.

Seattle, Washington.

THE ARGUS PRESS, SEATTLE

FILED
OCT 9 - 1919

NO. 3378

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA MINES CORPORATION, a Corporation,
Appellant,

— vs. —

HERBERT GREENBERG,
Appellee.

No. 3378

Upon Appeal from the United States District Court for the Territory of Alaska, Second Division

BRIEF OF APPELLANT

W. H. BOGLE,
F. T. MERRITT,
LAWRENCE BOGLE,
O. D. COCHRAN,
Attorneys for Appellant.

Seattle, Washington.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA MINES CORPORATION, a Corporation, *Appellant*, — vs. — HERBERT GREENBERG, *Appellee*.	No. 3378

Upon Appeal from the United States District Court for the Territory of Alaska, Second Division

---

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is a suit in equity, brought by appellee, plaintiff below, to foreclose a certain mortgage upon certain real and personal property situated in the Cape Nome Recording District, Alaska. The facts in the case are undisputed.

On April 17, 1917, appellant, being the owner of the real and personal property covered by the mortgage, at New York City, where it had its principal office and place of business, duly exe-

cuted its three promissory notes in writing, payable to the order of appellee at different times. These notes were for $5,000.00, $10,000.00 and $25,000.00 rspectively. (Transcript pp. 1-4, 68-71.) To secure the payment of the debt evidenced by these notes, appellant executed the mortgage in question on the same day the notes were executed. This mortgage was in proper form as a real and chattel mortgage, and it was duly recorded and filed as such. (Tr. pp. 9-22, 71, etc.)

On the same day the notes and mortgage were executed, appellee and one George K. McLeod entered into an agreement in writing, which recited the consideration, the cancellation of a prior agreement between said parties, and the execution of the notes and mortgage in question, referring to them as a "certain bond and mortgage in the sum of Forty Thousand ($40,000.00) Dollars."

The agreement then provided that:

> "Herbert Greenberg hereby *assigns* to George K. McLeod, an undivided eleven fortieths (11/40) interest in the aforesaid bond and mortgage of the Alaska Mines Corportaion.
>
> "Said Greenberg hereby agrees to receive any sums paid on account of the or notes of said Corporation, and said Mortgages, as trustee, and to pay over to said McLeod one-half thereof, until the sum of Eleven Thousand ($11,000.00) Dollars is paid thereout to said McLeod, and if the said Greenberg received

interest, he is also to pay to said McLeod interest on said Eleven Thousand ($11,00.00) Dollars, or any balance remaining due at any time.

"The parties agree that when said McLeod shall have received said Eleven Thousand ($11,000.00) with interest if any, he will *reconvey and release* to said Greenberg said Eleven-fortieths (11/40) of said bond and mortgage *just conveyed* to him, and *revest* in said Greenberg *all interest in said mortgage conveyed to him.*" (Italics ours.)

(Tr. pp. 47, 86, 136-138.)

The agreement then contained certain provisions to apply in case these notes were not paid by appellant. The notes were all made payable at Empire Trust Company, New York City. The notes for $5,000.00 and $10,000.00 were duly paid, and the last note, for $25,000.00, less a credit endorsed thereon on the day of its execution, fell due on January 15, 1918.

On January 11, 1918, said George K. McLeod served on appellant, at its New York office, a written notice as follows:

"January 11th, 1918.

Alaska Mines Corporation,
71 Broadway,
New York City.

"Gentlemen:

"You will please take notice ,that heretofore and by a written instrument, the original

pellee had failed and refused to pay said McLeod his one-half of the amount so collected, as provided by said agreement of April 17, 1917, between them. At the time of the commencement of said action, McLeod caused a writ of attachment to be issued out of said court, and the sheriff of said county duly served a notice of attachment, together with a copy of said writ, upon appellant at New York City at 3:50 P. M. on said January 15, 1918, the day said note fell due. (Tr. pp. 28-31, 34-61, 64, 87.) Appellee appeared in said action, and admits that said Supreme Court of New York had jurisdiction over the parties to said action, including himself, and of the subject matter thereof.

The suit so commenced by McLeod against appellee was pending up to the time of the trial of this suit, so far as appears from the record; and the writ of attachment so issued and served on appellant remained in full force and effect until September 27, 1918, more than five months after the commencement of this suit, when it was released under a bond given by appellee for that purpose. (Tr. pp. 87, 119-122.)

The suit at bar was commenced April 18, 1918, seeking a foreclosure of said mortgage for default in payment thereof. The action was commenced in the name of appellee alone, as plaintiff, McLeod not being joined either as plaintiff or defendant; no mention of his interest in the debt secured by the mortgage is made in the complaint, nor does

appellee sue as trustee for McLeod, but appellee alleges he was then the lawful owner and holder of the note and mortgage. (Tr. p. 6.)

Appellant answered the complaint, alleging affirmatively the notice served on it by McLeod, of his interest in the note and mortgage; also the agreement between McLeod and appllee of April 17, 1917, and McLeod's interest by reason thereof; and also the suit and attachment proceedings above mentioned. It also pleaded affirmatively the tender of payment made to the Empire Trust Company. (Tr. pp. 24, etc.)

Before the trial, and on February 1, 1919, appellant moved the court for an order requiring and directing that said George K. McLeod be brought into the action as a party plaintiff or defendant, on the ground that he was a real party in interest and a necessary party to the suit. (Tr. pp. 95, 96.) Appellee answered the motion, that McLeod had no interest in the note and mortgage; that he was a resident of New York and then outside of Alaska; that appellee was the trustee of an express trust; and that McLeod was not a necessary or proper party to a complete determination of the action. (Tr. pp. 97-98.)

The court denied the motion on the ground that appellee "was the trustee of an express trust, and, as such was authorized to sue in his own name." To this ruling appellant duly excepted. (Tr. p. 123.)

Thereafter and on February 15, 1919, appellant

asked and obtained leave to make certain amendments by interlineation in its answer, relative to its tender of payment at New York (Tr. p. 62); and at the same time appellee filed his amended reply, denying in part the allegations of tender in the answer. (Tr. pp. 63-67.)

There after and on February 19, 1919, appellant moved for a continuance of the cause, to enable it to obtain evidence in New York to prove its allegations of tender, which were denied in the amended reply served and filed four days previously, which motion was denied, and appellant excepted. (Tr. pp. 124-131.)

The case proceeded to trial on February 21, 1919, upon testimony offered in behalf of appellee. At the close of appellee's case, appellant moved for a dismissal of the action upon the grounds that—

> (a) "It is shown by the pleadings and by the evidence that one George K. McLoed is a necessary party to this action, and necessary to a complete determination of the action, being an assignee under contract of eleven-fortieths interest in the identical note sued upon and the mortgage sought to be foreclosed in this action."
>
> (b) "It is shown upon the face of the note that the note is payable at the Empire Trust Company in the city of New York, and that tender was made, at the date that the same became due, to the Empire Trust Company of

the amount due, which tender was refused by the Empire Trust Company by reason of its failure and inability to give the satisfaction of the mortgage sought to be foreclosed."

(c) "And for the further reason of an attachment being levied by one George K. McLeod in an action pending in the Supreme Court of the State of New York, for the County of New York, against the property of the plaintiff, Herbert Greenberg, in the hands of the defendant, Alaska Mines Corporation."

This motion was overruled, and appellant excepted. (Tr. pp. 165, 166.)

The court thereupon announced that he would give judgment in favor of appellee, with costs, including an attorney's fee of 10%, or $2,499.00.

Findings of Fact and Conclusions of Law, in accordance with the court's decision, were made and filed March 10, 1919 (Tr. pp. 68-90); and judgment thereon, and for a foreclosure of said mortgage and sale of the mortgaged property, was signed and filed March 15, 1919. (Tr. pp. 90-94.)

Questions Presented on Appeal

This appeal was duly allowed and taken, and is prosecuted from the judgment so entered.

The questions involved in this statement of the case and presented here by the assignment of errors, together with the manner in which those questions are raised upon the record, are as follows:

I.

Appellant will contend that it made a legal tender of the full amount due upon the note and mortgage at the time and place the same was payable; that the refusal of such tender operated as a release of the lien of the mortgage so that no foreclosure thereof could be had, and the action should have been dismissed.

Errors Nos. V, XI, XIII, XIV, XVI and XVII will be considered under this question.

II.

Appellant will contend that George K. McLeod was a necessary party to the action, and appellee had no legal right to prosecute the action without making said McLeod a party thereto, either as a plaintiff or a defendant therein; and the judgment cannot stand for this reason.

Errors Nos. II, IV, VII, VIII, X, XII, XV and XVII will be considered under this question.

III.

Appellant will contend that there could be no default in the mortgage nor any foreclosure thereof, while the attachment in the Supreme Court of New York remained undischarged; and for this reason the action was, in any event, prematurely brought and should have been dsimissed, or, in any event, no costs or attorney's fees allowed at all, or at least for services prior to the release of such attachment.

Errors Nos. V, VI, IX, XII, XIII, XIV and

XVII will be considered under this question.

IV.

Appellant will contend that, if there is any question under the evidence as to the sufficiency of its tender, in any respect other than the condition attached thereto that a release signed by both appellee and said McLeod be furnished, then the court erred in denying appellant's motion for a continuance.

Error No. III will be considered under this question.

SPECIFICATION OF ERRORS RELIED UPON

II.

The Court erred in refusing and denying the motion of the defendant to make George K. McLeod a party to the said action.

III.

The Court erred and committed an abuse of discretion in denying the motion of defendant for a continuance of the trial of said action.

IV.

The Court erred in denying the motion of the defendant made at the close of plaintiff's testimony to dismiss the complaint for the reason and upon the grounds that it was shown by the pleadings and by the evidence that one George K. McLeod was a necessary party to this action and necessary to the complete determination of the action, being an assignee under contract of eleven-fortieths interest in the identical note sued upon and the mort-

gage sought to be foreclosed in this action.

V.

The Court erred in denying the motion of the defendant to dismiss the complaint of the plaintiff because it was shown upon the face of the note that the note was payable at the Empire Trust Company in the City of New York and that tender was made on the date that the same became due, tothe Empire Trust Company, of the amount due, which tender was refused by the Empire Trust Company by reason of its failure and inability to give the satisfaction of the mortgage sought to be foreclosed, and for the further reason that an attachment had been levied by one George K. McLeod in an action pending in the Supreme Court in the City of New York, for the County of New York, against the property of the plaintiff Herbert Greenberg in the hands of the Alaska Mines Corporation.

VI.

The Court erred in directing that ten per cent of the amount of principal and interest due upon *said should* be computed as attorney's fees in said action because it is shown by the records and pleadings that at the time of the commencement of this action an attachment was levied against the amount due upon the identical promissory note sued upon in this action in the hands of the Alaska Mines Corporation and in the hands of the Empire Trust Company, and that said attachment so levied

was not released until the 27th day of September, 1918, and because said action having been prematurely commenced, no attorney's fees should be allowed in any event until the release of such attachment on the 27th day of September, 1918, and because there is no evidence as to the amount of a reasonable attorney's fee in this action for the prosecution thereof after the date of the release of said attachment.

VII.

The Court erred in making its finding number X as follows:

The Court finds that the plaintiff is the lawful owner and holder of said mortgage and said promissory note designated Schedule "A-3."

VIII.

The Court erred in making its finding numbered XII as follows:

The Court finds there is due, owing and unpaid from defendant to plaintiff, in principal and interest, on said promissory note designated as Schedule "A-3," the sum of Twenty-four Thousand Nine Hundred and Ninety Dollars ($24,990.00).

IX.

The Court erred in making its finding numbered XIII as follows:

The Court finds that the sum of Twenty-four Hundred and Ninety-nine Dollars ($2,499.00) is a reasonable sum to be allowed for attorney's fees for the commencement and prosecution of this

action to foreclose said mortgage.

X.

The Court erred in making its finding numbered XVIII as follows:

The Court finds that George K. McLeod had no interest in the note and mortgage sued upon in this action, and that the said George K. McLeod is not a proper or necessary party to this action.

XI.

The Court erred in making its finding numbered XX as follows:

The Court finds that the defendant never made any lawful tender to plaintiff of payment of said note on the 15th day of January, 1918, or at any time, or at all.

XII.

The Court erred in making its finding numbered XXIII as follows:

The Court finds that each and all of the allegations and averments in the first cause of action in plaintiff's complaint contained are true and correct.

XIII.

The Court erred in making its conclusions of law numbered I as follows:

That the plaintiff, Herbert Greenberg, is entitled to a judgment and decree against the defendant, Alaska Mines Corporation, a corporation, for the sum of Twenty-four Thousand Nine Hundred and Ninety Dollars ($24,990.00), with interest at the rate of eight per cent per annum from February

21st, 1919, being the date of the entry of decree herein, together with the sum of Twenty-four Hundred and Ninety-nine Dollars ($2,499.00) as attorney's fees in this action, and costs of suit taxed at the sum of $.......

XIV.

The Court erred in making its conclusion of law numbered II as follows:

That the said judgment in favor of plaintiff, Herbert Greenberg, be adjudged a prior lien by virtue of the said mortgage upon all the real and personal property described therein, and that said mortgage therein mentioned be foreclosed in the manner provided by law, and the real and personal property therein described sold in the manner provided by law, and the proceeds thereof applied to the payment of the amount found due to the plaintiff on the said promissory note designated as Schedule "A-3," together with interest, attorney's fees and costs, and that any surplus be delivered to the said defendant.

XV.

The Court erred in making its conclusions of law numbered III. as follows:

That by virtue of the agreement between plaintiff herein and one George K. McLeod, described in paragraph XIV of defendant's answer and annexed thereto and marked Exhibit "A" attached to Exhibit "C," plaintiff became a trustee of an express trust, and may sue without joining with

him the person for whose benefit the action is prosecuted, because that if the plaintiff did in fact and in law become a trustee of an express trust pursuant to any agreement with said George K. McLeod, then such trust was terminated by the said George K. McLeod long prior to the commencement of this action.

XVI.

The Court erred in makng its conclusion of law numbered IV as follows:

That no lawful tender of the amount due upon said note and mortgage sued upon herein has ever been made by defendant to plaintiff.

XVII.

The Court erred in ordering, adjudging and decreeing that the plaintiff Herbert Greenberg do have and recover of and from the defendant Alaska Mines Corporation, a corporation, the sum of Twenty-four Thousand Nine Hundred and Ninety ($24,990.00) Dollars, with interest at the rate of eight per cent per annum from the 21st day of February, 1919, together with the sum of Twenty-four Hundred Ninety-nine ($2,499.00) Dollars attorney's fees and costs of suit; and that the real and personal property described in said mortgage be sold to satisfy said judgment and decree. (Tr. pp. 175-180.)

Argument

TENDER

On the day the last note, secured by the mortgage

in question, fell due ,appellant tendered the full amount then due thereon to appellee's agent having the note for collection; such tender was made at the time and place when and where the note was payable, and the same was refused solely because the tender was conditioned upon a release being furnished signed by both appellee and George K. McLeod, to whom appellee had, in express terms in writing, assigned a 11/40ths interest. (Tr. pp. 31, 32, 65, 66, 87, 88, 142, 144-151.)

This being the only ground for the refusal of the tender, no other objection has been heretofore raised thereto, or will be considered on this appeal.

Appellee contends, and the trial court found and concluded, that the tender was not a "lawful tender," because a demand was made by appellant for a release of the mortgage to be executd by both appellee and McLeod. If the agreement between appellee and McLeod, dated April 17, 1917, transferred to McLeod an interest in the debt and mortgage securing the same, appellant had a legal right to require a release executed by both appellee and McLeod, and the tender was therefore sufficient.

> "A tender must not be coupled with any other conditions than those which it is the clear legal duty of the mortgagee to fulfill on receiving payment or satisfaction. But the mortgagor, on making tender to a person who claims to be the assignee of the mortgage, may require proof of his authority to collect the

surrender of the mortgage and note or bond, the delivery up of notes or property held as collateral security, and a release, cancellation, or entry of satisfaction of the mortgage."

27 Cyc. p. 1407.

"So a mortgagor who pays a bond and mortgage has a legal right to have the mortgage satisfied on the record. In no way except by a certificate of the holder of the mortgage can this result be accomplished. It is within the terms of the contract between the parties, and is a thing which, on payment of the debt, the mortgagee is under obligation to do, and one which a court of equity would compel him to do. It is a condition, therefore, which the mortgagor has a right to attach to the debt; and he may demand the production and tender of the debt, and does not destroy its effect."

Halpin v. Phoenix Insurance Co., 23 N. E. (N. Y.) 482, 485;

Engelbach v. Simpson, 33 S. W. (Tex.) 596;

Harding v. Giddings, 73 Fed. 335;

Wadleigh v. Phelps, 149 Cal. 627;

Johnson v. Cranage, 45 Mich. 14.

We think the rule announced in the foregoing authorities is universal, but if the rule is different in any other jurisdictions, then, the note, having been made in New York, payable there, the New York rule, as stated above, would apply. Or, if the

Alaska rule would apply, then the Alaska Code, § 1512, Compiled Laws of Alaska, 1913, would entitle appellant to impose the same condition. This section provides:

> "Whoever pays money, or delivers an instrument or property, is entitled to a receipt therefor from the person to whom the payment or delivery is made, and may demand a proper signature to such receipt as a condition of the payment or delivery."

Section 1513 provides:

> "The person to whom a tender is made shall at the time specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards."

Under this code provision, as well as the settled general rule of law, appellee cannot now object to the tender on any ground other than because of the condition for a relase which appellant attached to the tender.

But appellee contends that the agreement of April 17, 1917, between himself and McLeod, did not give McLeod such an interest in the note and mortgage as to entitle appellant to a release signed by McLeod as well as by appellee, and therefore

the condition was not proper and the tender insufficient.

In the lower court, appellee based this contention on two grounds: First, that the note could not be assigned without delivery; and second, that the agreement in question constituted appellee the trustee of an express trust for the benefit of McLeod, so that his signature to a release was unnecessary.

As to the first ground, the weight of authority is clearly the other way.

> "Where there is a note, bond, or other written obligation evidencing the debt, it has sometimes been said that there must be a delivery of the instrument. But by the weight of authority, delivery is not necessary if the assignment is proved by other satisfactory evidence.
>
> "Thus, where an assignment of a chose in action is made by a separate paper it will be valid, although the written evidence of the chose in action is not delivered."
>
> 5 C. J. p. 903, and cases cited.

The lower court held with appellee on the second ground, construing the agreement of April 17, 1917, between appellee and McLeod as constituting appellee the irrevocable trustee of an express trust, rather than as a transfer of an interest in the note and mortgage and the debt evidenced and secured thereby. If, as we contend, the court was in error

in so holding, then admittedly, the judgment must be reversed.

The record shows that at the time this agreement was executed, appellee was indebted to McLeod in the sum of $11,000.00 balance, which was secured by an agreement between them dated October 9, 1914. (Tr. pp. 111-115, 138.)

By the April 17th agreement, the agreement of October 9, 1914, was cancelled. The execution of the notes and mortgage by appellant to appellee is then recited, and the agreement then provides:

> "Herbert Greenberg *hereby assigns* to George K. McLeod an undivided eleven-fortieths (11/40) *interest* in the aforesaid bond and mortgage of the Alaska Mines Corporation." (Italics ours.)

It further provides:

> "The parties agree that when said McLeod shall have received said Eleven Thousand ($11,000.00) with interest if any, he will *reconvey* and *release* to said Greenberg said eleven-fortieths (11/40) *of said bond and mortgage just conveyed to him* and *revest in said Greenberg all interest* in said mortgage *conveyed* to him." (Italics ours.) (Tr. p. 47.)

These provisions clearly show the understanding and intention of the parties was to make an absolute transfer of an undivided interest in the notes and mortgage to McLeod, which would require a retransfer from McLeod to appellee when McLeod

had received his portion of the money due, in order to "revest" the whole title to the balance in appellee. Whether such transfer was a sale, or only for the purpose of securing the payment to McLeod of the $11,000.00 owing to him from appellee, makes no difference in this case.

The letter of April 17, 1917, from McLeod to appellee (Tr. pp. 118, 119), shows the same intention.

But appellee contends that this agreement constituted him the trustee of an express trust, because of the following provision therein:

> "Said Greenberg hereby agrees to receive any sums paid on account of the or notes of said Corporation, and said mortgages, as trustee, and to pay over to said McLeod one-half thereof, until the sum of Eleven Thousand ($11,000.00) Dollars is paid thereout to said McLeod, and if the said Greenberg received interest, he is also to pay to said McLeod interest on said Eleven Thousand ($11,00.00) Dollars, or any balance remaining due at any time."

We do not think this provision is sufficient to create a trust relation between the parties, except as to the moneys appellee actually received on account of the notes. It certainly did not give him a right to collect McLeod's interest in the moneys payable on the notes and mortgage, which right McLeod could not revoke, and against a claim

by McLeod himself, much less as against McLeod's protest, which he made by the notice served on appellant before the note in question was due. Much less did this provision reserve to appellee the legal title to the 11/40ths interest in the note and mortgage, which, by the other terms of the agreement, had been expressly *assigned* to McLeod.

The most this provision of the agreement could mean is, that appellee had authority, *as McLeod's agent* to collect McLeod's portion of the money, holding the same, when collected, as trustee; but this authority could be revoked by McLeod at any time, as the agency for such purpose was not coupled with any interest in appellee in McLeod's portion of the money. And such authority was revoked by McLeod when he served the notice on appellant that the 11/40ths interest had been assigned to him, and demanding that appellant pay him direct, instead of to appellee, his 11/40ths part of the money to become due. (Tr. pp. 27, 28.)

In the suit commenced by McLeod against appellee, McLeod alleged that appellee had collected the full amount due on the note of $10,000.00 which previously fell due, but that appellee failed and refused to turn over to McLeod one-half thereof, as he had agreed, although appellee admits he collected and received one-half thereof as trustee. (Tr. pp. 37-45.)

If these allegations were true, certainly those provisions of the agreement of April 17th did not

authorize appellee, over McLeod's protest, to collect McLeod's part of the last note also and refuse to pay that to McLeod. Nor could he do this even if McLeod's claim as to the money collected on the previous note were not true. McLeod still had a right to revoke appellee's authority to collect the 11/40ths of the money payable on the note in question, and require appellant to pay it to him.

In any event, we contend that appellee has no standing in a court of equity, in face of this agreement which he admits was made and still in force, and the dispute between himself and McLeod, to compel appellant to pay him the full amount due one the mortgage, accepting his release alone of the mortgage; and in default of such payment he had no right to ask a foreclosure of the mortgage, with large attorney's fees and costs, especially when appellant was at all times ready, able and willing to pay the full amount due upon receipt of a release signed by both parties entitled to the money and holding legal title to the mortgage, and it had offered to do so at the time and place the note fell due.

We do not think any authority can be cited to sustain such a contention on appellee's part. On the other hand, we think that appellant was entitled to such release from both said parties because, first, appellee was not a trustee of an express trust, as defined in the Alaska Code (which is similar to most other codes, or otherwise; second, because

McLeod, not appellee, held the legal title to a portion of the note and mortgage, which appellant had a right to have released by him as a condition of payment of the full balance due; or, third, that McLeod had at least such an equitable title thereto, or beneficial interest therein, as entitled appellant to such release from McLeod.

We submit that the following authorities sustain our contentions in these respects.

> "The distinction between a power and a trust has been clearly defined by the court. A mere power is not imperative, but leaves the action of the party receiving it to be exercised at his discretion—that is, the donor or grantor, having full confidence in the judgment, discretion and integrity of the party, empowers him to act according to the dictates of that judgment and the promptings of his own heart. A trust is imperative, and is made with strict reference to its faithful execution. The trustee is not impowered, but is required to act in accordance with the will of the one creating the trust."

Tiffany & B. Trusts & Trustees, quoted in *Law Guaranty, Etc., Co. v. Jones*, 103 Tenn. 245.

39 Cyc. 35, 66.

30 Cyc. 85, etc.

Cogan v. Conover Mfg. Co. 64 Atl. Rep. 973.

"Since the appellants have parted unconditionally with their interests in the property,

they cannot be trustees of an express trust with relation thereto."

Sweeney v. Waterhouse & Co., 39 Wash. 507.

Mitau v. Roddan, 84 Pac. (Cal.) 145.

In the agreement in question, appellee does not promise to collect the money on the notes, nor to do anything in connection therewith, except that he "agrees to receive any sums paid" on account thereof. He is permitted to receive the money, not required to do so. If he failed to take any steps to collect the money, he could not be held liable for breach of trust, but McLeod could only collect the money himself from appellant.

While, of course, appellee might have constituted himself trustee of the note and mortgage for the benefit of McLeod, yet, when he claims such relationship, rather than some other, over McLeod's protest, the intent on the part of both parties to the agreement to create such a trust relation must be clear, unmistakable, and not inconsistent with the transfer in express terms of the title to a portion of the note and mortgage to Mr. McLeod.

"A valid and effectual release of a mortgage can only be given by the person who is the rightful owner of the debt which it secures. Hence, after an assignment of the debt and mortgage, authority to give a release resides in the assignee, not in the assignor."

27 Cyc. 1416.

First Nat. Bank v. Miner, 48 Pac. (Colo.) 837.

"The assignment of a part of the debt secured by a mortgage, or of one of several notes so secured, carries with it a proportional interest in the mortgage and the security which it affords, unless it is otherwise agreed between the parties, although there is no formal assignment of the mortgage or any part of it."
27 Cyc. 1289, also 1286.

"There are numerous cases in which courts of equity will recognize a third person as entitled to the rights and privileges of an assignee of a mortgage, although there has been no formal transfer of the security to him; as in the case of an attempted written assignment which proves defective or invalid, an informal agreement to assign or give the third person the benefit of the security."
27 Cyc. 1293.

"The original mortgagee, even if the legal title to the mortgage has not been transferred, will thereafter hold it in trust for the assignee, and cannot release or discharge any portion of the debt secured or of the property covered, to the prejudice of the rights of the assignee."
27 Cyc. 1297, also 1299.

Generally "an assignment of a portion of the mortgage debt carries with it, by operation of law, an assignment of a proportionate

share of the mortgage security."

27 Cyc. 1304.

"An assignment of one of several notes secured by mortgage, or an assignment of any distinct part of the indebtedness secured, carries with it a *pro tanto* interest in the mortgage; and such has been held to be the effect in the assignment of a certain amount of the mortgage moneys, with a right to priority payments."

Jones on Chat. Morts. (3rd Ed.) § § 504, 505.

"It is for the assignee of a mortgage to receive payment of the debt secured and to give a good satisfaction and discharge of the mortgage."

27 Cyc. 1314.

In the lower court, appellee contended that the decision of this court in the case of *Northern Commercial Co. v. Lindblom*, 162 Fed. 250, is authority to sustain his position that he was the irrevocable trustee of an express trust. But in that case the shipper of goods owned them until they were delivered at the mine, and he had never assigned the bills of lading. The case is not in point. On the other hand, where a shipper has assigned the bills of lading, he cannot collect damages for loss of the goods, either as trustee of an express trust, or otherwise.

Sweeney v. Frank Waterhouse & Co., 39 Wash. 507, 81 Pac. 1005.

If we are correct that a lawful tender was made, then the lien of the mortgage was discharged and there was no mortgage to foreclose. Much less could appellee refuse to comply with the conditions the law imposed as a result of his own written contract of assignment ,and ask a court of equity to decree a foreclosure of the mortgage lien, with heavy attorney's fees and costs of such foreclosure. Appellee's remedy, then, was to sue on the debt, joining McLeod in the suit, and ask to have the rights of himself and McLeod to the money settled, and McLeod required to execute a proper release. In such an action, appellant could have paid the money into court and been protected against costs, and secure a release of its mortgage from all parties interested therein either legally or equitably.

> "A due tender at maturity discharges the lien of the mortgage, although not kept good."
> 27 Cyc. 1409.
>
> *Kortright v. Cody*, 21 N. Y. 343.
>
> *Thomas v. Seattle Brewing & Malting Co.*, 48 Wash. 560, 94 Pac. 116.
>
> *Easton v. Littooy*, 91 Wash. 648, 158 Pac. 531.
>
> *Cass v. Higenbotam*, 3 N. E. (N. Y.) 189.

But appellee contends appellant cannot have the advantage of its tender, even if sufficient when made, because it did not bring the money into court in this action.

The rule that a tender must be kept good by

bringing the money into court does not apply to a tender which discharges a lien but does not discharge the debt. In the latter case only must the tender be kept good by bringing the money into court.

38 Cyc. p. 172.

Thomas v. Seattle B. & M. Co., supra.

Easton v. Littooy, supra.

Murray v. O'Brien, 56 Wash. 361, 105 Wash. 840.

To require appellant to bring the money into court, would be only for the purpose of allowing appellee to accept it, without furnishing a release signed by McLeod. As he had no right to the money without furnishing such a release, there would be no purpose in requiring the money to be brought into court. Further, in equity, an offer in the pleadings to pay or perform is sufficient without actual deposit of the money in court. Again, where it appears that the tenderee is unable to perform the conditions the law imposes on him, before he is entitled to receive the money, no deposit in court is necessary.

Furber v. National Metal Co., 103 N. Y. Supp. 490.

Becker v. Boon, 61 N. Y. 317.

If appellant had a right to a release signed by both appellee and McLeod, to whom an interest in the mortgage had been assigned in express terms, then clearly it was not compelled to take the money,

which was payable in New York, to Alaska and pay it into court in an action to foreclose the lien, not merely to collect the debt, especially as appelee had refused and still refuses to furnish a release signed by McLeod.

For the foregoing reasons, we think the judgment must be reversed, and the action dismissed.

McLeod a Necessary Party

Even if the court should be of the opinion that the tender was not sufficient to require a reversal of the judgment, we think it must be reversed and the action dismissed, or, in any event, that a new trial be granted and McLeod ordered to be made a party.

If we are correct that appellee was not a trustee of an express trust, then it will be conceded that McLeod was a necessary party to this action. We think that he was a necessary party, plaintiff or defendant, as one of the real parties in interest, under the provisions of Section 857 of the Alaska Code, and under the general rules of equity pleading, even though some trust relationship existed between him and appellee. The following authorities sustain this contention.

> "In the strictest sense the only necessary parties are the mortgagee, the mortgagor, and those who have acquired interests in the premises subsequent to the mortgage. But the mortgagee here means not only the mortgagee of record, but also the real owner of the

debt, or all the persons who are entitled to share in it, or generally those to whom the substantial benefit of the foreclosure will accrue."

27 Cyc. 1563, 4.

"As a general rule no decree of foreclosure can be made unless all the parties to the mortgage money are before the court. Therefore one of two or more joint mortgagees cannot maintain an action for foreclosure without joining the others; if they refuse to join him as complainants, they should be made defendants."

27 Cyc. 1563, 4.

The Trades Savings Bank v. Freese, 26 N. J. Eq. 453.

"After a mortgagee has formally assigned and transferred the mortgage and debt, he cannot maintain an action for foreclosure; but if the assignment for lack of formality or on account of irregularity, was not sufficient to vest the legal title to the securities in the assignee, the suit must be brought in the name of the assignor, for the use and benefit of the assigne. But the owner of a mortgage is not prevented from foreclosing it in his own name by the fact that he has pledged it as collateral security for a debt less than the face value of the mortgage, if he acts with the consent of the pledgee, or if, on the

latter's refusal to foreclose, he joins him as a party."

27 Cyc. p. 1544.

"Any form of assignment of a mortgage, if absolute and unconditional, which suffices to transfer to the assignee the real and beneficial ownership of the securities, will entitle him to maintain an action for foreclosure.

"As an absolute assignment or transfer of the debt secured by a mortgage, or of the note or bond evidencing it, vests the ownership of the securities in the assignee, with all the assignor's rights accruing under the mortgage, even without any formal assignment of the mortgage itself, a person so holding and owning the debt secured will be entitled to foreclose the mortgage, although the latter instrument does not stand in his name."

27 Cyc. pp. 1544-5.

"Plaintiff in a foreclosure suit should be the real and beneficial owner of the debt secured, together with any others who are jointly interested with him in the security."

27 Cyc. 1568.

"The assignee of a mortgage may maintain in his own name a bill in equity, or a statutory action for its foreclosure."

27 Cyc. 1309.

"Where a mortgage is assigned as collateral security for a debt, it amounts to a mort-

gage of a mortgage, * * * It is the duty of the assignee to use proper diligence and care in the management of the securities, in order that the assignor may have the benefit of their avails. He may execute the power of sale contained in the mortgage, and may foreclose it, cutting off the rights not only of the mortgagor but also of his assignor, if the latter is properly joined as a party in the proceedings."

27 Cyc. p. 1314.

"As a rule, whenever the assignment of a chose in action vests the assignee with the ownership of the claim, the action is to be brought in the name of the assignee, as the real party in interest, and this whether the title of the assignee be regarded as legal or equitable."

30 Cyc. 47.

"The effect of the assignment being to divest the assignor of his ownership, an action on the chose can no longer be brought in his name, either alone or for the use of the assignee. Nor is the rule affected by the fact that the assignor, in making the assignment, has expressly authorized an action in his name upon the assigned chose in action, or has expressly stipulated that if an action is necessary he will bring it in his own name and turn over the proceeds to the assignee."

30 Cyc. 49.

"When the assignment did not pass the legal title but only the beneficial title, it is usual, in equity pleading, to make the assignor, holding the legal title, a party to the suit. But it was not fatal if the assignor was not joined as plaintiff, the necessary plaintiff was the assignee, as being the beneficial owner."

30 Cyc. 49.

"When the assignor retains a portion of the beneficial ownership, the general principle of the real party in interest gives him a standing as plaintiff. As a rule the assignee also should be a party to the suit, as coplaintiff or as defendant."

30 Cyc. pp. 51, 85, etc.

Bacon v. O'Keefe, 43 Pac. (Cal.) 886.

The rules as to necessary parties in suits in equity, and the reasons therefor, are given and discussed at length in the leading case of

Mahr v. Norwich Union Fire Ins. Co., 28 N E. (N. Y.) 391.

For the reasons above given, and under the foregoing authorities and the provisions of Section 857 of the Alaska Code, we think McLeod was not only a proper, but a necessary and indispensable party to any suit upon the note in question, or to foreclose the mortgage securing the same; and therefore the judgment must be reversed.

The New York Attachment

It will not be disputed that any defense to an action on the note could be made to this action to foreclose the mortgage.

> "As a general rule the same defenses may be made in a suit to foreclose a mortgage which might be made in an action on the debt which the mortgage is given to secure."
> 27 Cyc. 1549.

The note evidencing the indebtedness in question was made and payable in New York. Appellant had its principal office and place of business there. The day this note fell due McLeod duly attached the debt due from appellant on account of this note and mortgage. Appellee admits the New York court had jurisdiction of the parties, including himself, and of the subject matter of the suit (Tr. pp. 28-31, 64), and the court so found. (Tr. pp. 86, 87.) This New York action was pending, and the attachment in effect, when this suit was commenced, and until September 27, 1918, more than five months thereafter.

This suit was commnced because of an alleged then existing default for non-payment of the debt secured. We fail to see how appellant could be in default for non-payment, when payment was stopped by an attachment in an action against the party claiming the default. It would seem that appellee should have secured a release of the attachment and enabled appellant to make pay-

ment without liability to pay twice, before appellee could ask a court of equity, even in another jurisdiction, to find appellant was in default for non-payment.

Nor could the subsequent release relate back five months to the commencement of this suit, and constitute a default as of that time. If no default then existed, no right to foreclose existed, and this action was prematurely brought and must be dismissed, or at least modified by striking out all attorney's fees and costs.

> "The rights of a party to an action are ordinarily to be determined as of the time of bringing the suit."
>
> *Weeks v. Baker*, 152 Mass. 20.
>
> *Murray v. O'Brien*, 56 Wash. 361, 376.

Before appellee should be permitted to claim a default he should release the attachment, and no offer of security to appellant should suffice. When he did not do this, he had no right to declare the mortgage in default for non-payment and ask heavy costs for a foreclosure of the mortgage, which appellant could not safely pay so long as the attachment was in force.

The court allowed full costs and attorney's fees in the case "for the commencement and prosecution of this action to foreclose said mortgage." (Tr. p. 86.) No evidence was introduced, nor finding made, as to the value of the attorney's services after September 27, 1918, when the attach-

ment was released.

For these reasons we think the judgment should be reversed, or at least modified by striking out all costs and attorney's fees, and awarding appellant costs in this court.

> "The pending of garnishment proceedings in a foreign jurisdiction may be pleaded in abatement, or in bar, of an action upon the same cause."
>
> 20 Cyc. 1141, and cases cited.
>
> *Wallace v. M'Connell*, 13 Peters 143.
>
> "No effectual sale under a power or by decree of court in a foreclosure suit can be made until the occurrence of the event upon the happening of which a sale or foreclosure is authorized."
>
> Jones on Mortgages (3rd Ed.) § 1174.

Our contention on this point would seem so clear that the citation of further authority is unnecessary. If we are not correct, then a mortgagor ready, able and willing to pay his debt, but prevented from doing so by a valid attachment or garnishment thereof in a suit against his creditor, may be declared in default by the creditor, who permits him to remain liable under the attachment or garnishment; and he may be compelled to pay heavy costs or run the risk of having to pay his debt twice. Certainly that is not the law, and the lower court erred in decreeing a foreclosure in this case with full costs and attorney's fees,

merely because the attachment was released by appellee furnishing a release bond months after this suit was commenced and the expense incurred.

MOTION FOR CONTINUANCE

Appellant assigns error on the refusal of the trial court to grant a continuance to enable it to secure evidence in support of the amended allegations of its answer relative to its tender.

These allegations were merely to show that the check tendered by appellant in payment of the note was good. No objection was made that it was not good, nor that a check instead of cash was tendered, nor for any other reason than the condition attached requiring a release signed by McLeod. If we are correct that no other objection could or can be raised in this suit, this evidence was immaterial, and the ruling was correct. However, if the evidence was necessary to show a valid tender, then we think the trial court erred in refusing th continuance.

The amendments were allowed and made on February 15, 1919 (Tr. p. 62); the reply denying these allegations was filed the same day. That was the first time appellant knew it would be compelled to secure proof of these allegations. All its evidence on the question was in New York. Yet it was denied a continuance to secure this evidence and forced to trial without it on February 21, 1919. We think this was clearly an abuse of discretion, requiring a reversal, provided, of course, such

evidence would have shown a legal tender which is not otherwise established.

In Conclusion

Appellant has found itself in a very peculiar postion in this matter. It gave its note secured by mortgage, which it was ready and willing to pay when and where due, and offered to do so. Appellee had seen fit to transfer in writing an interest in this note and mortgage, whether absolutely or as security makes no difference. Appellant was not a party to this transfer, and had no interest in it. Appellant had paid the previous notes to appellee, but McLeod, claiming appellee had refused to account to him for his part of the money paid on one of the prior notes, decided to collect his own part of this note and served notice on appellant of his interest and a demand to pay him the amount thereof instead of paying all to appellee.

In these circumstances, certainly appellant had a right to be protected against a claim by McLeod, by requiring a release of the mortgage, which a payment of the note would satisfy, signed by both parties interested therein. It offered to pay in full upon that condition. But appellee refused this offer, and, in spite of McLeod's claim to an interest in the proceeds of this note and in the mortgage, and in spite of McLeod's attachment of appellee's interest in the debt on account of appellee's alleged refusal to account for the proceeds

of the previous note, appellee caused this action to be commenced thousands of miles away, asking a court of equity to find appellant was in default for non-payment of the debt, and to decree a foreclosure of the mortgage and a sale of appellant's property to pay to appellee the full amount of the debt, with heavy costs and attorney's fees.

Certainly before the court will permit the judgment entered under these circumstances to stand, it must feel compelled to do so. It is no answer for appellee to say he had physical possession of the note and mortgage and would surrender them on payment and give his own satisfaction of the mortgage. That would not protect appellant from McLeod's claim of an interest in the unpaid note, nor from his attachment on account of the payment of the previous note. Appellant had actual notice of McLeod's interest by assignment; and a payment to appellee of the full amount due, even if it received the note and mortgage from appellee, would not protect appellant from McLeod's claim, nor would appellee's satisfaction of the mortgage clear the record from McLeod's assignment which he had sent to the recorder for record. (Tr. p. 42.)

This is not a case where appellee is liable to lose any of this money to which he is entitled, if this foreclosure is denied. He can still sue appellant for the debt and bring McLeod into the action, so that their respective rights to the money

can be determined. Appellant is perfectly able and willing to pay the full amount due into a court which has jurisdiction to enter a judgment which will protect appellant from any claim by McLeod. Appellant has no interest in the dispute between appellee and McLeod, and in such an action it could protect itself against the costs of the suit made necessary only because of such dispute.

Appellee is not willing to have these matters settled in this manner, but asks a court of equity to force appellant to pay him the entire amount of the debt, with heavy costs and attorney's fees, leaving appellant liable to a suit by McLeod for his interest in the note and mortgage.

We think the rule of equity, that he who asks equity must do equity, has special application in this case; and that, for the reasons above given, the judgment appealed from should be reversed and the action dismissed, or appellee required to bring McLeod into the action and permit appellant to pay its debt, but without costs or attorney's fees.

Respectfully submitted,

W. H. BOGLE,

F. T. MERRITT,

LAWRENCE BOGLE,

O. D. COCHRAN,

Attorneys for Appellant.

No. 3378

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA MINES CORPORATION (a corporation), *Appellant,* vs. HERBERT GREENBERG, *Appellee.*	}

Upon Appeal From the United States District Court for the Territory of Alaska, Second Division.

BRIEF FOR APPELLEE.

WILLIAM A. GILMORE,
Central Building, Seattle, Washington,
Attorney for Appellee.

FILED
OCT 22 1919
F. D. MONCKTON,
CLERK.

No. 3378

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA MINES CORPORATION (a corporation),

Appellant,

vs.

HERBERT GREENBERG,

Appellee.

Upon Appeal From the United States District Court for the Territory of Alaska, Second Division.

BRIEF FOR APPELLEE.

Statement of the Case.

For convenience herein we shall refer to the parties as designated in the trial court. We have no serious objection to the statement of the facts as detailed in defendant's brief. However, we desire to supplement the statement and try to make the story told in the transcript more understandable. It is to be observed at the beginning that there are no disputed facts as the defendant at the trial did not offer any testimony whatever. The

suit was submitted to the trial court on plaintiff's case which included copies of a number of agreements, letters, telegrams and notices which were all proper exhibits admitted and received in evidence.

On and prior to April 17th, 1917, plaintiff Greenberg was the owner of many valuable placer mining claims and a dredging hull and machinery connected therewith (Tr. pp. 46 and 99). Prior to said date one George K. McLeod had a lien on said mines (Tr. p. 111) for $13,350.81 payable "from the first proceeds from the sale or the first proceeds from the working or mining of any of said property". On said date, April 17th, 1917, Greenberg made two deals with the defendant, Alaska Mines Corporation, to wit:

1st. He sold said company certain real and personal property outright for $50,000 receiving $10,000 in cash and $40,000 payable in three installments evidenced by three promissory notes of $5,000, $10,000 and $25,000, secured by a mortgage (Tr. p. 9) on the property so sold by him.

2nd. On said date he gave said company an option for $125,000 on certain other mining property (Tr. p. 99), all of said mining property, both real and personal included in both deals being situated in the Cape Nome Mining and Recording District, District of Alaska, where this foreclosure suit was subsequently begun.

At the same time these two deals were made and consummated in New York City on April 17th, 1917, and to further facilitate the same Greenberg

and said McLeod entered into the agreement (Tr. p. 46) repeatedly referred to in defendant's brief as an assignment. At the same time said agreement was entered into and at the time said Greenberg received the cash payment on said 17th day of April, 1917, from the defendant, Alaska Mines Corporation, the said McLeod received from said Greenberg in cash enough to reduce his original claim from $13,350.81 to $11,000. Under the express terms of this new agreement the former lien agreement of October 9th, 1914) (Tr. p. 111) between Greenberg and McLeod was cancelled and superseded and all the rights of McLeod defined and determined by this new agreement, which was entered into for two apparent reasons:

1st, to clear the title of the property sold outright to the Alaska Mines Corporation, and

2nd, to define the balance due McLeod and the method and manner in which it should be paid to him.

This agreement (Tr. pp. 46-49) is plain and explicit, unambiguous and speaks for itself. Plaintiff contends it was the intention of the parties thereto to create an express trust, giving Greenberg the absolute right to own and hold the notes and mortgage and to collect the money due thereon as well as to foreclose said mortgage if the notes were not paid. It is admitted that Greenberg for himself and as such trustee collected the first note of $5000 and paid McLeod one-half of the proceeds thereof reducing his claim of $11,000 to $8500 on June 15th, 1917.

It is also admitted and undisputed that Greenberg collected for himself and as such trustee the second note of $10,000 on November 15th, 1917, and without objection on the part of McLeod thereby showing the intention, scope and purpose of the trust agreement.

When the third note for $25,000 fell due January 15th, 1918, for the first time Greenberg's authority to collect and deliver the notes was questioned by McLeod and the defendant, Alaska Mines Corporation. By the terms of the trust agreement it is expressly provided that if the Alaska Mines Corporation shall not pay the amounts due on its notes and mortgage the property shall be foreclosed and if at the mortgage sale the property was sold to Greenberg or anyone in his interest, then Greenberg should revive the former lien held by McLeod under the agreement of October 9th, 1914, to the extent of any unpaid balance, and further, if the Alaska Mines Corporation should exercise its option and purchase of Greenberg the other mining claims for $125,000 Greenberg was to hold said sum as trustee to satisfy any balance due McLeod. It was further agreed that if the said option was not exercised by the Alaska Mines Corporation, or if through the foreclosure proceedings enough money was not received to pay off McLeod then McLeod was to have a lien on all of Greenberg's property covered by the option for the unpaid balance and, finally, it was provided that in default of Greenberg giving such a lien to McLeod for the balance

due, Greenberg agreed to pay the balance as a debt. The plaintiff contended in the pleadings and at the trial and now contends that the said agreement was an agreement creating an express trust and not an assignment as claimed by the defendant.

The trial court in its findings (Tr. p. 67) and decree (Tr. p. 90) found and decreed that the said agreement was an express trust agreement between McLeod and Greenberg and not an absolute assignment of a part of the notes and mortgage, and under such express trust McLeod was not a necessary party to the foreclosure proceedings, and, therefore, the so-called tender was not a lawful tender.

PLAINTIFF'S CONTENTIONS.

1st. Plaintiff contends that the agreement between Greenberg and McLeod (Tr. pp. 46-49) created an express trust wherein the plaintiff Greenberg had the right, title, possession and ownership to the notes and mortgage and the right to collect, receipt and satisfy for the same for himself and as trustee for McLeod.

2nd. That the so-called tender by defendant of its check on January 15th, 1918, and its subsequent offers to pay through its attorneys and agents coupled with a demand for a release or satisfaction signed by McLeod was a conditional tender and insufficient in law.

3rd. That there was a default under the terms of the mortgage and plaintiff had the right in his own name to foreclose the same.

4th. That McLeod was not a necessary party to the foreclosure proceedings; and

5th. That no error was committed in refusing a continuance.

The above contentions will all be discussed herein under the assignment of error as to whether or not the court erred in entering its decree for plaintiff and in holding that the agreement between Greenberg and McLeod was a trust agreement instead of an absolute assignment of a part of the debt as claimed by the defendant.

Argument.

The facts in this case are not complicated and as they are all admitted and undisputed the transcript is easily understood.

The trial court in its findings, conclusions and decree ruled that the agreement between Greenberg and McLeod made and entered into on the 17th day of April, 1917, at New York (Tr. pp. 46-49) was an express trust agreement wherein Greenberg became trustee and McLeod cestui que trust, and was not an absolute assignment as claimed by the defendant. If this ruling by the trial court was correct, and we contend that it was, then the defend-

ant did not make a lawful tender on the 15th day of January, 1918, or at any time thereafter, or at all, and defaulted on the terms of said mortgage. If the trial court ruled correctly then Greenberg had a right to collect the money due and satisfy the mortgage and account to McLeod for his part and McLeod was not a necessary party to the foreclosure suit. As we view the legal questions involved in this appeal the question of tender and the question of whether McLeod was or was not a necessary party all depend upon the construction of the agreement between Greenberg and McLeod. At the very outset of the argument we will concede that if the agreement was not an express trust as claimed by the plaintiff in his pleadings and at the trial that then it must have been an absolute assignment of a part interest so as to make McLeod a necessary party, plaintiff or defendant, to the foreclosure proceedings.

Under either construction we take the position that the so-called tender made by the defendant on January 15th, 1918, and its various alleged subsequent offers to pay did not and do not constitute a legal tender so as to defeat either the mortgage lien or the foreclosure of the mortgage whether McLeod is or is not a necessary party thereto as the so-called tender was one coupled with conditions under the circumstances impossible to accept as shown by the notices, letters and telegrams in the transcript, and, therefore, was what is known in the law as a conditional tender.

It is our contention that if the appellate court takes the same view of the contract between McLeod and Greenberg that the trial court took all the errors assigned and complained of by defendant are easily answered and the authorities cited do not apply.

Before attempting to apply the law applicable to the facts and with a full knowledge of the circumstances under which the said agreement was entered into and considering the purpose, scope and intention of the same we contend that the said agreement is open to only one construction, that is, that the same is an express trust.

We remind the court that the original debt existing between McLeod and Greenberg amounted to the sum of $13,350.81 as shown by their prior agreement of October 9th, 1914 (Tr. p. 111); that said debt had been reduced either by payments from the proceeds of the mining of the property or from the cash payment received from the sale at the time the mortgage was given by the Alaska Mines Corporation to the sum of $11,000. We direct the court's attention to the language of the agreement as follows:

> "Said Greenberg hereby agrees to receive any sums paid on account of the notes of said corporation and said mortgages as trustee, and to pay over to said McLeod one-half thereof," etc.

The language of said agreement and the plain intent thereof indicates an assignment of a part

of the proceeds after collection by Greenberg and this counsel fails to grasp. It is clearly shown that the intention of the agreement was that Greenberg was to collect the money on maturity of the notes and satisfy the mortgage and as trustee pay McLeod the amount of money due him and if the notes were not paid Greenberg was to foreclose the mortgage, sell the property according to law, and if Greenberg bought the property he was to revive the former lien in favor of McLeod for an unpaid balance and also if the Alaska Mines Corporation should exercise its option for $125,000 Greenberg agreed to hold said funds in trust to cover any balance to McLeod and in the event the option was not exercised and the foreclosure was insufficient to pay the balance then McLeod was to have a lien against all of Greenberg's mining property for the unpaid balance and upon a refusal on the part of Greenberg to give said lien then McLeod's balance was to be a debt of Greenberg's. A mere glance at this agreement shows that McLeod was amply protected. It is undisputed in the record that Mr. Greenberg was a man of great wealth and at all times willing and ready to pay McLeod everything due him under the agreement. We direct the court's attention to the fact that it is undisputed that under the terms of the agreement Greenberg collected the $5000 on the first note paying McLeod one-half thereof and reducing his unpaid balance to $8500. In Mr. Greenberg's testimony it appears that McLeod was indebted to him in the sum of $6000,

which left an unpaid balance of only about $2500 to McLeod on the 15th day of November, 1917, when the $10,000 note was collected by Greenberg. Because Greenberg insisted on his $6000 claim against McLeod, McLeod then became hostile and commenced his suit at law garnishing the defendant Alaska Mines Corporation on the date when the $25,000 note fell due. We direct the courts attention to the correspondence by letters and telegrams that passed between the attorneys and agents of the plaintiff and defendant for several months after the date when said $25,000 note became due and particularly to the offer on the part of the plaintiff (Tr. p. 155) to deposit the sum of $10,000 from the proceeds of the note with the Empire Trust Company in New York City, the bank at which said note was payable, to protect the defendant company against any claims on the part of McLeod which said offer as well as the offer of the plaintiff (Tr. p. 151) to forward and surrender the note with a release and satisfaction in full signed by Greenberg was refused and rejected by said defendant. It is admitted in the evidence that on September 28th, 1918 (Tr. p. 161) the garnishment or attachment was discharged and although it does not appear in the transcript because the plaintiff Greenberg was not in Nome at the trial in February, 1919, it is a fact that in November, 1918, the said suit filed by McLeod was dismissed in New York and McLeod was paid over the sum of $5000 on the balance claimed by him leaving a balance due McLeod at the time of the trial less than $3000 against which Mr.

Greenberg still claims a counter-claim of $6000 in his favor against McLeod.

In view of the above facts in construing the agreement between Greenberg and McLeod how can it seriously be contended that said agreement was an absolute assignment of eleven-fortieths of the notes and mortgage? How could defendant pay McLeod eleven-fortieths of the $25,000 note? All the rights McLeod ever had under the terms of said agreement at the time the said $25,000 fell due on January 15th, 1918, was a suit for an accounting against Greenberg and that is his only remedy at the present time and would be his only remedy if the said note was paid and the mortgage satisfied by Greenberg.

Now to make our position still plainer we ask the court to consider the law applicable to a proper construction of said agreement between Greenberg and McLeod.

> "An express trust is generally created by an instrument that points out directly and expressly the property, persons, and purposes of the trust."
>
> Perry on Trusts and Trustees, Vol. I, p. 17, Sec. 24.

> "An express trust primarily assumes three parties, the one who by proper language, creates, grants, confers, or declares the trust; the second who is the recipient of the authority thus conferred; and the third for whose benefit the authority is received and held. It is true that in many instances the first named parties are actually but one person that is, the same indi-

vidual declares, confers, receives and holds the authority for the benefit of another."

Pomeroy's Code Remedies, 3rd Ed., Sec. 172.

"In equity choses in action, expectancy, contingent interest and even possibility may be assigned, and a valid trust created in them."

Perry on Trusts & Trustees, Sec. 68.

"The doctrines of trust are equally applicable to real and personal estate, and the same rules govern trusts in both kinds of property."

Perry on Trusts & Trustees, Sec. 16.

"A trust owned, created and accepted with reservation of power can only be revoked by the full consent of all the parties in interest."

Perry on Trusts & Trustees, Vol. I, Sec. 104;
Helman v. McWilliams, 70 Cal. 449.

"Any agreement or contract in writing, made by a person having the power of disposal of property, whereby such person agrees or directs that a particular parcel of property or a certain fund shall be held or dealt with in a particular manner for the benefit of another, in a court of equity raises a trust in favor of such other person against the person making such agreement, or any other person claiming under him voluntarily or with notice."

Perry on Trusts & Trustees, Vol. I, p. 79, Sec. 82.

"It cannot be doubted that, under some circumstances, a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subject to such

obligations that those for whom he holds will be bound by what is done against him as well as what is done for him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce a trust."

Kerrison v. Stewart, 93 U. S. 155.

See, also, to the same effect:

Shaw v. Norfolk County R. Co., 5 Gray 171;

Bifield v. Taylor, 1 Beat. 91;

Ashton v. Atlantic Bank, 3 Allan 220.

"Although under the code an action is to be brought by the real party in interest, if the assignee of a chose holds for the benefit of another, or under an agreement is bound to account to another for the proceeds of the chose, he is in a number of states regarded as the trustee of an express trust, and, as such, permitted to sue in his own name without joining his beneficiary."

5 Corpus Juris, 1003, Sec. 212;

Walburn v. Chenault, 23 Pac. 657;

Murphin v. Scovell, 47 N. W. 256;

Guerney v. Moore, 32 S. W. 1132;

Robbins v. Deverall, 20 Wis. 142.

"One of the exceptions in some of the statutes, requiring an action to be brought in the name of the real party in interest, permits trustees of an express trust to sue without joining the *cestui que trust.*"

20 R. C. L., p. 667, Sec. 7;

30 Cyc., 85.

In re Stiger 202 Fed. 791-795

Section 857, Compiled Laws of Alaska, provides as follows:

> "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in section eight hundred and fifty-nine; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of a contract."

Section 859 of the Compiled Laws of Alaska above referred to is as follows:

> "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section."

With the rule enunciated in defendant's brief and supported by its authorities to the effect that in a court of equity it is the duty of the court to bring before it all persons beneficially interested in the cause, we have no fault to find; that is the general rule, but like other equitable rules, it has the exception which proves the rule. Now the exceptions are those cases wherein a specific person is authorized to sue by law for the benefit of another person or beneficiary, or a *cestui que trust,* when not actually before the court. The exception to the rule is clearly enunciated by Section 859 of the Compiled Laws of Alaska above quoted and is again reiterated in the Compiled Laws of Alaska, Section 1194, as follows:

> "Every action of an equitable nature shall be prosecuted in the name of the real party in interest except as in this section otherwise provided. An executor or an administrator, a trustee of an express trust, or a person expressly authorized to sue by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust within the meaning of this section shall be construed to include a person with whom and in whose name a contract is made for the benefit of another."

Now it is manifest that the statute of Alaska by enunciating the rule gives the trustee in the absence of fraud the right to bring the suit. The above statute gives the plaintiff the express right as trustee to maintain the suit of foreclosure to recover the proceeds of the note for himself and McLeod. The Compiled Laws of Alaska define what shall constitute a trustee of an express trust and these statutes have been considered and construed by this court and upheld. The sections of the Compiled Laws above quoted were considered and upheld in the case of Northern Commercial Co. v. Lindbloom, 162 Fed., p. 250. In that case Mr. Lindbloom acquired certain personal property for the purpose of shipping and sending it up to the Kobuk Mining District. He was grub-staking three men in the Kobuk under a partnership agreement and the property was placed on the steamship Sadie at Nome for consignment to the three men in the Kobuk. The property was the property of Lindbloom and his three associates and was lost in transit. The steamship company contended that

the legal title was vested in the three men in the Kobuk and that Lindbloom was not the proper party to sue but this court applied the sections of the Compiled Laws above quoted and held that Lindbloom was the trustee of an express trust and particularly held that it was not necessary to the creation of a trustee of an express trust that he be actually named as such where the circumstances and facts show that he is such. We quote from the syllabus::

> "Plaintiff was still entitled to sue as the trustee of an express trust even if the title of the outfits passed to the firm consisting of himself and the persons to whom the outfits were to be delivered, and should be regarded as the owner of the goods from the time they were delivered to the steamship for transportation."

See, also, the case of Waterman v. Chicago, Milwaukee & St. Paul Railroad, 50 Am. Rep. p. 145;

Trustees v. Adams, 4 Ore. 78;

Hexter v. Schneider, 12 Pac. 668;

U. S. v. McCann, 66 Pac. 274;

Holladay v. Davis, 5 Ore. 40;

Wright v. Conservative Investment Co., 89 Pac. 387.

In the case at bar there is a provision in the agreement between Greenberg and McLeod which specifically states that Greenberg is to act as trustee. How much stronger the facts are than in the Lindbloom case above cited! By the use of the words assign and reassign in the said agreement between Greenberg and McLeod the clear meaning of the

agreement is not changed. It would have been just the same had they stated in the agreement that Mr. Greenberg was to collect the proceeds of the notes and pay therefrom the sum of $11,000 to McLeod and if he failed to collect it or didn't pay it certain liens were to be created or certain other things were to be done. The agreement in its clearest construction simply provided for Greenberg to collect the money due on the notes and contemplated a return of the notes and a satisfaction of the mortgage or in the event the notes were not paid a foreclosure of the mortgage and subsequent acts on his part to secure McLeod. Under this construction of the agreement there was neither a due tender by the defendant on the 15th day of January, 1918, or at any time thereafter, nor was McLeod in any way a necessary party to the foreclosure suit. Greenberg had all the notes and the mortgage in his possession, collected the proceeds of the first and second notes and delivered the notes to the Alaska Mines Corporation and had the complete control of all of the matters involved up to and including the time that the plaintiff's agent, Empire Trust Co. demanded payment of the note on January 15th, 1918.

In this foreclosure suit Greenberg is before the court trying to acquire the trust funds or the property covered by the mortgage for the very purpose of carrying out the trust agreement and under the terms of the trust agreement.

The agreement between Greenberg and McLeod was at best a pledge on the part of Greenberg of a portion of the proceeds of the notes with certain conditions to be carried out between them. Greenberg did not deliver possession of either the notes or the mortgage or any part of either and was only to deliver a part of the proceeds after collection by him. Under these facts McLeod was not a necessary party. See case of Consolidated National Bank of San Diego v. Hayes et al., 44 Pac. 466.

It is a matter of every day practice that one person may be the legal owner and another the beneficial owner of a chose in action. A promissory note or an instrument of that character may be assigned from one person to another for collection or for a nominal consideration. One person may hold the legal title to an instrument for money both in law and in equity and it is never challenged that the parties so doing have the right to conduct the litigation. It would be a useless procedure to compel those equitably interested to be brought into court. By bringing McLeod into this foreclosure proceeding could not in any manner whatever determine the rights between Greenberg and McLeod. That can only be done by suit in accounting to determine what, if any, unpaid balance still remains due McLeod and whether or not Mr. Greenberg has faithfully carried out the trust agreement. McLeod is now interested only in seeing that the money is paid into court or that the money is recovered at the sale of the property and then if

he does not receive any balance due him he has the double remedy left of compelling Greenberg to give him a lien on all of his other valuable mining properties that was optioned at $125,000 or in lieu thereof sue Greenberg at law and recover judgment. Greenberg is admitted by the record to be solvent and has testified affirmatively that he is ready and willing to pay McLeod any and all balance due him.

The trial court in construing the agreement between Greenberg and McLeod having reached the conclusions that the same was an express trust agreement was governed by these sections of the Compiled Laws of Alaska and rightly ruled that McLeod was not a necessary party to the foreclosure proceedings. It is true that McLeod could have voluntarily intervened in the foreclosure proceedings in this suit for the purpose of obtaining any unpaid balance due from Greenberg to him if he so desired but apparently he did not see fit to so intervene because nothing further is due him at present and under the plain provisions of the code of Alaska above cited he was not a necessary party in adjudicating the equities between the plaintiff and defendant.

We have no quarrel with counsel for defendant on the law cited in their brief applicable to partial assignments and the rights of the assignee but contend the law quoted does not apply to the agreement between Greenberg and McLeod.

The transcript sets out all of the proceedings in the court in New York brought by McLeod against

Greenberg showing that his garnishment or attachment was based upon the trust agreement and his alleged notice of his so-called assignment was nothing more than the trust agreement between him and Greenberg so that at the time the $25,000 note was presented on the date of its maturity for payment the defendant Alaska Mines Corporation had before it as a basis for McLeod's claims against Greenberg the trust agreement and nothing more, and when the defendant Alaska Mines Corporation thereupon offered its check to the Empire Trust Company but refused to deliver the same unless it had a release and satisfaction of the mortgage signed by McLeod such a demand on its part was a condition imposed impossible to fulfill as shown by the subsequent correspondence.

A tender to be good must be unconditional.

38 Cyc., 154.

> "Where a person is to perform an act, the obligation to perform which is independent of any precedent or concurrent act to be performed by the other party, as where money is to be paid in liquidation of a debt, or the object is to discharge the tenderer of the obligation, the money or thing to be delivered must be tendered unconditionally."

38 Cyc., p. 152.

Cornell v. Hayden, 114 N. Y. 271;

Coghlan v. South Carolina R. Co., 32 Fed. 316;

Boulon v. Moore, 14 Fed. 922;

14 Cen. Dig. "Tender", Section 33.

> "If an action has been commenced on the mortgage, a tender must include costs to date, and also an attorney's fee, if that is stipulated for in the mortgage."
>
> 27 Cyc. p. 1408.

In the case at bar the mortgage specifically provided for a reasonable attorney's fee in case of default and foreclosure and the evidence is uncontradicted that the attorney's fees allowed by the court in this case were reasonable. Defendant complains of the cost and expense but we submit it could have avoided all this by either accepting the deposit of ten thousand dollars offered, or by depositing the money in court.

A tender of payment or performance of a mortgage, to be effective, must be open, fair and reasonable. The demand of the Alaska Mines Corporation for a release and satisfaction by McLeod who was known by it to be hostile to Greenberg and only claiming under the trust agreement was a conditional tender and one impossible under the circumstances for Greenberg to comply with. The so-called tender coupled with this demand under the circumstances was not open, fair and reasonable. It was not such a due tender as equity demands in order to discharge the lien of the mortgage as claimed by the defendant in its brief. Plaintiff offered to give defendant a written satisfaction of the mortgage but defendant demanded the further condition of McLeod's release as well.

It was incumbent upon the plaintiff to keep his tender good and upon the commencement of the

action by Greenberg to have deposited the money in court. The whole effect of the tender is to stop interest and prevent costs; and to be effectual for such purposes it must be kept good by the debtor, and whenever he seeks to make it the basis of affirmative relief it must be paid into court. When the plaintiff commenced this foreclosure suit, the defendant, if it was sincere in its allegations of tender and its allegations of a large bank account in New York, should have immediately filed its answer alleging its tender as claimed by it and with said allegations it should have deposited with the clerk of court the amount of its tender. By so doing if it were right in its contentions it could have forestalled all costs and attorney's fees thereafter. It seemed to be interested more in protecting McLeod than itself.

We submit that under the laws of Alaska applicable to mortgages the defendant had no right to request a satisfaction of the mortgage from the plaintiff Greenberg in any event and all that was necessary for the plaintiff to do on the 15th day of January, 1918, at the time the defendant offered its check was to deliver the note which the Empire Trust Company offered to do having the note in its possession at the time.

Section 528, Compiled Laws of Alaska, provides as follows:

> "Any mortgage that has been or may hereafter be recorded may be discharged by an entry in the margin of the record thereof, signed by

> the mortgagee or his personal represenative or assignee, acknowledging the satisfaction of the mortgage, in the presence of the commissioner or a deputy, who shall subscribe the same as a witness, and such entry shall have the same effect as a deed of release duly acknowledged and recorded."

Section 529 provides as follows:

> "Any mortgage may also be discharged upon the record thereof by the commissioner in whose custody it shall be whenever there shall be presented to him a certificate executed by the mortgagee, his personal representatives or assigns, acknowledged or proved and certified as hereinafter prescribed to entitle conveyance to be recorded, specifying that such mortgage has been paid or otherwise satisfied or discharged."

Section 531 of the Compiled Laws of Alaska provides a penalty for refusal or neglect to so satisfy a mortgage that is paid and provides a penalty in the sum of $100 and actual damages sustained.

Under these provisions of the Alaskan laws all that was required of plaintiff was to deliver the note at the time of the payment and thereafter within a reasonable time satisfy the record by either of the methods provided by the sections quoted above. The principle enunciated in defendant's leading case, Halpin v. Phoenix Ins. Co., 23 N. E. (N. Y.) 482, and supporting cases, is inapplicable under these code provisions.

The court will observe by reading the corresondence that passed between the attorneys and agents of the plaintiff and defendant following the offer

of the check, that the plaintiff offered to satisfy and release the said mortgage by either method.

A due tender such as discharges the mortgage lien is a tender of the full amount due in such a manner and without such conditions that the mortgagee can accept or refuse.

We admitted the offer of the check by defendant with the conditions attached. There was nothing to be gained by taking the testimony on behalf of the defendant on this particular point, and, therefore, no error in the court in denying a motion for continuance after the pleadings were amended by the defendants at the defendant's request prior to the trial. We did not make any objections to the check tendered as money but could not accept the alleged tender on account of the conditions attached to it either on the 15th of January or at any time thereafter.

The offer of plaintiff (Tr. p. 155) to deposit $10,000 of the proceeds of the note with the Empire Trust Company to protect defendant from all claims of McLeod who was then only claiming an unpaid balance in all of $8500 clearly put said defendant in the position of defaulting on the note and mortgage and it would be inequitable to hold this suit was prematurely brought thereafter. The attachment was released anyway on September 28th, 1918, and at least the defendant should have thereupon deposited the money in court to forestall further costs before complaining.

In conclusion we submit the record in this case shows that the defendant Alaska Mines Corporation never at any time on the 15th day of January, 1918, when the note matured or at any time since has made any serious effort to pay the amount due. At all times it seemed more concerned in trying to collect the money for McLeod than trying to extricate himself from the mortgage lien. If the defendant was acting in good faith at the time Greenberg offered to deposit $10,000 of the proceeds with the Empire Trust Co. of New York to release it from the attachment and claims of assignment set forth by McLeod it could have readily deposited the money with the Empire Trust Company, accepted the note and satisfaction offered by Greenberg and within a reasonable time all of the difficulties could have been straightened out. In its brief the defendant bitterly complains that the foreclosure suit was commenced thousands of miles away and large costs were piled up for attorney's fees and interest. The only place the foreclosure suit could have possibly been commenced was in the court at Nome where the property covered by the mortgage was situated. The foreclosure suit could not be maintained anywhere else. It was always in the power of the Alaska Mines Corporation to protect itself against attorney's fees and costs, both expenses and interest by depositing the money in court where McLeod would undoubtedly then have intervened long before the time of the trial. This foreclosure suit was commenced in April, 1918, and it was not tried until February, 1919, almost a year thereafter dur-

ing which time the defendant, Alaska Mines Corporation, never made the slightest effort by depositing the money (which it claims it has at all times had on deposit in its bank in New York) into the registry of the court or otherwise to forestall costs of suit. It would be inequitable in the extreme for this court to reverse this case on the theory that it had been brought prematurely or to hold that the mortgage lien had been cancelled by the alleged tender. Such a contention under the facts as disclosed by the record in this case is a mere subterfuge and an effort to pay an honest debt by conversation. The plaintiff delivered to the defendant valuable property of which they have had the undisputed use and possession and are still in the possession of the property using the same at Nome while litigating Greenberg all this time on the theory that they made a lawful tender and should not pay him his expenses in attemtping to get his money. The Alaska Mines Corporation not only should be compelled to pay the principal of the note but the interest due thereon together with the legal costs and attorney's fees which the court under the testimony found to be reasonable.

We respectfully submit the judgment of the lower court should be affirmed.

William A. Gilmore,
Attorney for Appellee.

No. 3379

United States
Circuit Court of Appeals
For the Ninth Circuit.

GUISEPPI PINASCO,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

FILED
AUG 27 1919
F. D. MONCKTON,
CLERK.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3379

United States
Circuit Court of Appeals
For the Ninth Circuit.

GUISEPPI PINASCO,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Acceptance of Service of Citation 51
Amended Motion to Quash Indictment......... 5
Arraignment 8
Assignments of Error.................... 34
Bill of Exceptions 22
Certificate of Clerk U. S. District Court to Transcript of Record 46
Citation 49
Indictment 2
Motion in Arrest of Judgment............... 15
Motion to Require Government to Elect........ 9
Names and Addresses of Counsel............. 1
Order Denying Motion to Require Government to Elect 11
Order Fixing Appeal and Supersedeas Bond... 18
Order Overruling Motion in Arrest of Judgment 16
Order Overruling Motion to Quash Indictment.. 8
Petition for Writ of Error 31
Praecipe for Transcript of Record............ 43
Recognizance on Writ of Error to Circuit Court of Appeals 20

Index. Page

Sentence 17
Stipulation Fixing Time to File Writ of Error and Citation and Docket Cause........... 52
Trial—May 8, 1919.......................... 11
Trial (Continued)—May 9, 1919.............. 12
Verdict 14
Writ of Error 47

Names and Addresses of Counsel.

Messrs. TUCKER & HYLAND, Attorneys for Plaintiff in Error.

307 Lowman Bldg., Seattle, Washington.

GEORGE H. RUMMENS, Esq., Attorney for Plaintiff in Error,

612 American Bank Bldg., Seattle, Washington.

ROBT. C. SAUNDERS, Esq., Attorney for Defendant in Error,

310 Federal Bldg., Seattle, Washington.

CHARLOTTE KOLMITZ, Attorney for Defendant in Error,

310 Federal Bldg., Seattle, Washington. [1*]

United States District Court, Western District of Washington, Northern Division.

November Term, 1918.

No. 4593.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPI PINASCO,

Defendant.

---

*Page number appearing at foot of page of original certified Transcript of Record.

Indictment.

The United States of America,
Western District of Washington,
Northern Division,—ss.

The grand jurors of the United States of America, being duly selected, impaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

COUNT I.

That GUISEPPI PINASCO on the third day of January, one thousand nine hundred and nineteen, in the house occupied by the said Guiseppi Pinasco on the premises described as the "Prato Gardens," situated one-fourth mile north of the Duwamish River and about ten rods west of the Pacific Highway in the Northern Division of the Western District of Washington, and within the jurisdiction of the United States District Court for said division and district, did then and there unlawfully and feloniously carry on the business of a distiller without having given bond as required by law; contrary to the form of the statute in [2] such case made and provided and against the peace and dignity of the United States of America.

COUNT II.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That GUISEPPI PINASCO on the third day of January, one thousand nine hundred and nineteen, in the house occupied by the said Guiseppi Pinasco

on the premises described as the "Prato Gardens," situated one-fourth mile north of the Duwamish River and about ten rods west of the Pacific Highway in the Northern Division of the Western District of Washington, and within the jurisdiction of the United States District Court for said division and district, and within the Internal Revenue Collection District of Washington, being then engaged in and then intending to be engaged in the business of a distiller, did then and there wilfully, knowingly and unlawfully fail to give notice in writing to the Collector of Internal Revenue for the collection district aforesaid, as required by Section 3259 of the Revised Statutes of the United States; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT III.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: [3]

That GUISEPPI PINASCO on the third day of January, one thousand nine hundred and nineteen, in the house occupied by the said Guiseppi Pinasco on the premises described as the "Prato Gardens," situated one-fourth mile north of the Duwamish River and about ten rods west of the Pacific Highway in the Northern Division of the Western District of Washington, and within the jurisdiction of the United States District Court for said division and district, and within the Internal Revenue Collection District of Washington, unlawfully did make and ferment a certain mash fit for distillation, to wit,

forty gallons of raisin mash, in a certain building, to wit, the dwelling-house of the said Guiseppi Pinasco, not then and there a distillery duly authorized according to law; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT IV.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That GUISEPPI PINASCO on the third day of January, one thousand nine hundred and nineteen, in the house occupied by the said Guiseppi Pinasco on the premises described as the "Prato Gardens," situated one-fourth mile north of the Duwamish River and about ten rods west of the Pacific Highway in the Northern Division of the Western District of Washington, and within the jurisdiction of the United States District Court for said division and district, and within the Internal Revenue Collection District of [4] Washington, unlawfully did use a certain still for the purpose of distilling in a certain dwelling-house there situate; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

ROBT. C. SAUNDERS,
United States Attorney.
BEN L. MOORE,
Assistant United States Attorney.

[Indorsed]: Indictment for Violation Sections 3281, 3259, 3282 and 3266. A True Bill. W. P.

Graham, Foreman Grand Jury. Presented to the Court by the Foreman of the Grand Jury in open court, in the presence of the Grand Jury, and filed in the U. S. District Court. Mar. 14, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [5]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4593.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPI PINASCO,

Defendant.

Amended Motion to Quash Indictment.

Comes now the defendant, Guiseppi Pinasco, by and through Tucker & Hyland, his attorneys, and moves the Court to quash the first count of the indictment herein, for the following reasons, to wit:

I.

That said count is indefinite, uncertain and insufficient in law, and it does not state specific or sufficient facts in law to constitute a crime and offense against the Government of the United States. That the Act of Congress under which said offense is sought to be charged is repealed by the Act of March 3, 1917, commonly known as the Reed Amendment.

II.

That said second count in said indictment is in-

definite, uncertain and insufficient in law, and it does not state specific or sufficient facts in law to constitute a crime and offense against the Government of the United States. That the Act of Congress under which said offense is sought to be charged is repealed by the Act of March 3, 1917, commonly known as the Reed Amendment. [6]

III.

And moves the Court to quash the third count of said indictment, for the reason that same is indefinite, uncertain and insufficient in law, and does not state specific or sufficient facts in law to constitute a crime and offense against the Government of the United States. That the Act of Congress under which said offense is sought to be charged is repealed by the Act of March 3, 1917, commonly known as the Reed Amendment.

IV.

And moves the Court to quash the fourth count of said indictment, for the reason that same is indefinite, uncertain and insufficient in law, and does not state specific or sufficient facts in law to constitute a crime and offense against the Government of the United States. That the Act of Congress under which said offense is sought to be charged is repealed by the Act of March 3, 1917, commonly known as the Reed Amendment.

V.

Said defendant moves to quash the whole of said indictment, on the ground and for the reason that there is now commenced and pending in the United States District Court for the Western District of

Washington, Northern Division, a proceeding entitled, "United States of America, Libelant, v. One Machine for Corking Bottles, One Blow-Torch, One Remington 12-gauge repeating shotgun of slide action, Two 50-pound boxes of Buena Fruita, brand dried raisins, Two copper kettles, One rubber hose, Eleven hundred dollars in currency, One cashier's check for $600.00 unendorsed, One one-man cross-cut saw, One copper still, twenty-gallon capacity, [7] together with still, cap and coil complete," being No. 4537, said proceeding being a proceeding of condemnation of property of the defendant, Guiseppi Pinasco, for the same offense charged and set forth in each of the counts in said indictment herein. Reference is hereby made to the files, records and proceedings in the office of the clerk of said court for certainty, and this motion is based upon the files, records and proceedings in said cause, as well as upon the proceedings in the above-entitled action.

TUCKER & HYLAND,
Attorneys for Defendant.

Service of within Amended Motion this 4th day of Apl., 1919, and receipt of a copy thereof, admitted.

ROBT. C. SAUNDERS,
D.
Attorney for Plaintiff.

[Indorsed]: Amended Motion to Quash Indictment. Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 5, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [8]

United States District Court, Western District of Washington, Northern Division.

No. 4593.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPI PINASCO,

Defendant.

Order Overruling Motion to Quash Indictment.

ARRAIGNMENT—MOTION TO QUASH INDICTMENT AND PLEA.

Now, on this 7th day of April, 1919, the above-named defendant comes into court for arraignment, accompanied by his attorney Wilmon Tucker. Motion is made to quash indictment, which is argued by respective counsel. Motion is denied and defendant enters a plea of not guilty to the charges against him. Trial is set for April 30, 1919.

Journal 7, Page 327. [9]

United States District Court, Western District of Washington, Northern Division.

No. 4593.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPI PINASCO,

Defendant.

Motion to Require Government to Elect.

Comes now Guiseppi Pinasco, the defendant above named, by Tucker & Hyland and Geo. H. Rummens, his attorneys, and moves the Court as follows:

I.

That the plaintiff above named be required to elect whether it will proceed with and try the defendant under the indictment in the above-entitled cause, or whether it will proceed with and try the proceeding now pending in the above-entitled court in cause number 4537, entitled:

"United States of America, Libelant, vs. One Machine for Corking Bottles, One blow-torch, One Remington 12-gauge repeating shotgun of slide action, Two 50-pound boxes of Buena Fruita brand dried raisins, Two copper kettles, One rubber hose, Eleven hundred dollars in currency, One cashier's check for $600.00, unendorsed, One one-man cross-cut saw, One copper still, twenty-gallon capacity, together with still, cap and coil complete."

This motion is made and based upon the records and files in this cause, being cause number 4593, and upon the records and files in cause number 4537, hereinabove described, and to [10] all of which reference is hereby made for certainty.

II.

That in the event of the preceding motion being denied, and in the alternative, defendant by his counsel aforesaid, moves the Court for an order requiring the Government to elect whether it will proceed to

try defendant on Count I, Count II, Count III or Count IV.

That defendant submits and contends that the Government does not have the right to try said defendant upon more than one of said counts in said indictment, for the reason that all of the pretended offenses charged in said Count II, Count III and Count IV, are embraced and contained in and are but elements going to constitute the offense charged in the foregoing Count I.

This motion is made and based upon the records and files in cause number 4593.

TUCKER & HYLAND,
GEO. H. RUMMENS,
Attorneys for Defendant.

[Indorsed]: Motion to Require Government to Elect. Filed in the United States District Court, Western District of Washington, Northern Division. May 8, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. **[11]**

United States District Court, Western District of Washington, Northern Division.

No. 4593.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUISEPPI PINASCO,
Defendant.

Trial—Order Denying Motion to Require Government to Elect.

Now, on this 8th day of May, 1919, the above-entitled cause comes on for trial, Robt. C. Saunders and Charlotte Kolmitz appearing for the plaintiff, and Wilmon Tucker and Geo. H. Rummens for the defendant said defendant being in court in his own proper person. Motion is filed by defendant to require the plaintiff to elect whether to proceed with and try defendant under indictment herein or whether it will proceed with and try cause No. 4537 in this court. Motion is denied and exception noted. Motion is filed by defendant to require plaintiff to elect whether it will proceed to try defendant on Count I, Count II, Count III or Count IV of the indictment, and motion is denied and exception allowed. A jury being called come and answer to their names as follows: Ezra T. Pope, W. T. Gray, Berman Schoenfeld, James F. Parks, Albert J. Schoephaoester, Charles A. Bailey, E. H. Ahrens, M. J. Hursen, Charles H. Roach, Winfield S. Riggs, J. N. Johnson and Louis Shorett, twelve good and lawful men duly empaneled and sworn. Whereupon plaintiff's witness Claude W. Estes is sworn and examined. Defendant objects to the introduction of any evidence on Counts I, II, III and IV on the ground that they do not state facts sufficient to constitute a crime. Denied and exception allowed. Plaintiff's witnesses Kenneth L. Webb, G. Gordon, Carl Prado and W. T. Beeks are sworn and examined and exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

and 21 are introduced. Defendant's witness E. R. Tobey is sworn and examined. And now the hour of adjournment having arrived, [12] by consent of parties it is ordered that this cause be continued until ten o'clock to-morrow morning, and the jurors having been cautioned, it is ordered that they be allowed to separate until that hour.

Journal 7, page 356. [13]

United States District Court, Western District of Washington, Northern Division.

No. 4593.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPI PINASCO,

Defendant.

Trial (Continued).

Now, on this day, May 9, 1919, the hour of trial having arrived, attorneys for both sides present, the call of the jury is waived, all being present in their box, whereupon witnesses for plaintiff are sworn and examined as follows: W. T. Beeks, recalled; James H. Woods, W. R. Jarrell, C. E. Rix, Grant L. Miller, W. W. Anderson and Ray W. Clough, and exhibit No. 1 introduced, at which time the plaintiff rests. George H. Rummens, for defendant, moves the Court for a directed verdict of not guilty on Counts I, II, III and IV of the indictment, and each of them on

the ground that none of them contain statements of fact constituting a crime, and that the evidence adduced does not establish a crime. Motion is denied and exception allowed. Defendant moves the Court to require the plaintiff to elect upon which of the counts of the indictment it will proceed to prosecute. Motion denied. Exception allowed. Defendant's witnesses Joe Columbus, G. B. Perelli, Joe Bessire, and A. Segale are sworn and examined, at which time the defendant rests. George H. Rummens, for defendant, renews his motion for a directed verdict of "not guilty" as above set forth. Motion denied and exception allowed. The cause is argued to the jury by both sides, and the jury being instructed by the Court retire in charge of sworn bailiffs for deliberation at 11:50 A. M. It is ordered that the jury and two bailiffs be fed at Government expense. And now on this same day the jury comes into open court, to wit, at 2:00 P. M. The call of the jury is waived, all present in their box. A verdict is returned as **[14]** follows: "We, the jury in the above-entitled cause, find the defendant Giuseppi Pinasco is guilty as charged in Count I of the indictment herein; and further find the defendant Giuseppi Pinasco is guilty as charged in Count II of the indictment herein; and further find the defendant Giuseppi Pinasco is guilty as charged in County III of the indictment herein; and further find the defendant Giuseppi Pinasco is guilty as charged in Count IV of the indictment herein. Berman Schoenfeld, Foreman." The verdict is ordered filed and the jury discharged from further consideration of case and excused for the

term. Defendant is allowed to go on his present bond. Defendant is granted 42 days within which to file any motion or exception he may desire.

Journal 7, page 357. [15]

In the District Court of the United States for the Western District of Washington.

No. 4593.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPI PINASCO,

Defendant.

Verdict.

We, the jury in the above-entitled cause find the defendant Giuseppi Pinasco is guilty as charged in Count I of the indictment herein; and further find the defendant Giuseppi Pinasco is guilty as charged in Count II of the indictment herein; and further find the defendant Giuseppi Pinasco is guilty as charged in Count III of the indictment herein; and further find the defendant Giuseppi Pinasco is guilty as charged in Count IV of the indictment herein.

BERMAN SCHOENFELD,

Foreman.

[Indorsed]: Verdict. Filed in the United States District Court, Western District of Washington, Northern Division, May 9, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [16]

United States District Court, Western District of Washington, Northern Division.

No. 4593.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPI PINASCO,

Defendant.

Motion in Arrest of Judgment.

Comes now the defendant, Guiseppe Pinasco, and moves the Court to arrest the judgment on the indictment herein, upon which the defendant was convicted, and upon each and every count thereof, upon the ground and for the reason that the facts therein stated do not constitute a crime or offense against the laws or statutes of the United States.

WILMON TUCKER,
GEO. H. RUMMENS,
Attorneys for Defendant.

[Indorsed]: Motion in Arrest of Judgment. Filed in the United States District Court, Western District of Washington, Northern Division, June 16, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [17]

United States District Court, Western District of Washington, Northern Division.

No. 4593.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPI PINASCO,

Defendant.

Order Overruling Motion in Arrest of Judgment.

And now on this day there having come for hearing the motion of the defendant for an arrest of judgment herein, and the Court having heard the argument of Robert C. Saunders, Esq., counsel for the Government, and of George H. Rummens, Esq., counsel for the defendant, and being fully advised in the premises;

IT IS NOW CONSIDERED, ORDERED AND ADJUDGED that the said motion be and the same is hereby overruled as to Counts I, II and IV, and sustained as to Count III, to all of which the defendant excepts, and the exception is allowed.

Done in open court this 16th day of June, 1919.

EDWARD E. CUSHMAN,

Judge.

O. K.—ROBT. C. SAUNDERS,

U. S. Dist. Atty.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 16, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [18]

United States District Court, Western District of Washington, Northern Division.

No. 4593.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPI PINASCO,

Defendant.

Sentence.

Comes now on this 16th day of June, 1919, the said defendant Giuseppi Pinasco into open court for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, he nothing says save as he before hath said. Wherefore, by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant is guilty of violating Secs. 3281, 3259 and 3266, R. S., and that he be punished by being imprisoned in the King County Jail, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States, for the term of thirty days on Count I, and that he pay a fine of $100.00 on Count I, and that execution issue therefor; and that he pay a fine of $100.00 on Count II, and that execution issue therefor; and that he be confined in the King County Jail, or in such other place as may be provided for the imprisonment of offenders

against the laws of the United States, for the term of six months on Count IV, to run concurrently with Count I, and that he pay a fine of $1,000.00 on Count IV; and the defendant is to be further imprisoned in the said County Jail until said fines are paid or until he shall be otherwise discharged by due process of law.

Judgment and Decree Book No. 2, page 371. [19]

United States District Court, Western District of Washington, Northern Division.

No. 4593.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPE PINASCO,

Defendant.

Order Fixing Appeal and Supersedeas Bond.

And now on this day the above-named defendant Guiseppe Pinasco, at the time of sentence, having given notice of his intention of applying for a writ of error to the Circuit Court of Appeals and having at the same time asked the Court for an order fixing bond to supersede the judgment of the Court, and the Court being fully advised in the premises;

IT IS NOW CONSIDERED, ORDERED AND ADJUDGED, that the appeal and supersedeas bond herein be and the same is hereby fixed in the sum of *Two Thousand* ($2,000.00); and it further appearing

that there is now in the hands of the clerk of this court the sum of *Two Thousand* ($2,000.00) as bond for the appearance and trial of said defendant;

IT IS NOW ORDERED that said sum of money be retained by the Clerk of this Court as and for the appeal and supersedeas bond of the said defendant herein.

Done in open court this 16th day of June, 1919.

EDWARD E. CUSHMAN,
Judge.

O. K.—ROBT. C. SAUNDERS,
U. S. Dist. Atty.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. June 16, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [20]

United States District Court, Western District of Washington, Northern Division.

No. 4593.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUISEPPE PINASCO,
Defendant.

Recognizance on Writ of Error to Circuit Court of Appeals.

United States of America,
Western District of Washington,
Northern Division,—ss.

Be it remembered that on this 16th day of June, 1919, before me, F. M. Harshberger, Clerk of the court aforesaid, personally came Guiseppe Pinasco, as principal, and acknowledged himself to owe the United States of America the full sum of Two Thousand ($2,000.00) Dollars, herewith deposited with said court in cash, if default be made in the condition following, to wit: The condition of this recognizance is such that whereas the said Guiseppe Pinasco has been by the above-entitled court sentenced to pay a fine and to imprisonment, as set forth in the judgment of sentence herein, and whereas said Guiseppe Pinasco has in open court at the time sentence was pronounced given notice of his intention to apply for a Writ of Error to the Circuit Court of Appeals, and for an order fixing his bond thereon and the Court having fixed said appeal and supersedeas bond at the sum of Two Thousand ($2,000) Dollars;

NOW, THEREFORE, if the said Guiseppe Pinasco shall appear before said United —— Circuit Court of Appeals for the Ninth Circuit and shall prosecute his Writ of Error, and shall pay, satisfy and perform the aforesaid judgment of sentence, and shall pay, satisfy and perform any judgment of the said United States Circuit Court of Appeals to be entered in said cause or any judgment [21] which

said Circuit Court of Appeals may order*ed* made or entered by said United States District Court for Western District of Washington, Northern Division, and shall at all times hold himself amenable to and abide by all orders and process of the aforesaid District Court and the aforesaid Circuit Court of Appeals, and shall render himself in execution of any judgment therein, and shall not depart from the jurisdiction of said United States District Court without leave thereof, then this recognizance shall be void; otherwise to remain in full force and virtue.

GUISEPPE PINASCO.

Taken and acknowledged before me this 16th day of June, 1919.

S. E. LEITCH,

Deputy Clerk of the United States District Court for the Western District of Washington.

O. K.—ROBT. C. SAUNDERS,

U. S. Dist. Atty.

Foregoing bond is hereby approved.

Dated June 16, 1919.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. June 16, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [22]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4593.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPI PINASCO,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED: That heretofore, and on the 8th day of May, 1919, this cause came on for trial before the Honorable Edward E. Cushman, Judge, presiding; the plaintiff appeared by Robert C. Saunders, United States District Attorney, and Charlotte Kolmitz, Assistant United States District Attorney; the defendant appeared in person and by his attorneys: Wilmon Tucker and George H. Rummens.

WHEREUPON, the following proceedings were had, to wit:

Prior to the calling and impaneling of the jury, the defendant interposed a motion requiring the Government to elect whether it would proceed against the defendant upon the Indictment pending herein or whether it would proceed with and try a proceeding now pending in the same court in Cause No. 4537, entitled: "The United States of America, Libelant, v. One Machine for Corking Bottles, etc.";

WHEREUPON, the Court overruled and denied

said motion, and to the said order of the Court the defendant asked and was allowed an exception;

WHEREUPON, a jury was duly impaneled and sworn [23] and the opening statement of the Government was made;

WHEREUPON, a witness was called by the Government and duly sworn;

WHEREUPON, the defendant objected to the introduction of any testimony as to Count No. I of the Indictment for the reason and upon the ground that Count No. I does not state facts sufficient to constitute a crime;

WHEREUPON, the Court denied and overruled said objection, and the defendant asked and was allowed an exception to said ruling;

WHEREUPON, the defendant objected to the introduction of any testimony as to Count No. II of the Indictment for the reason and upon the ground that Count No. II does not state facts sufficient to constitute a crime;

WHEREUPON, the Court denied and overruled said objection, and the defendant asked and was allowed an exception to said ruling;

WHEREUPON, the defendant objected to the introduction of any testimony as to Count No. III of the Indictment for the reason and upon the ground that Count No. III does does not state facts sufficient to constitute a crime;

WHEREUPON, the Court denied and overruled said objection, and the defendant asked and was allowed an exception to said ruling;

WHEREUPON, the defendant objected to the

[24] introduction of any testimony as to Count No. IV of the Indictment for the reason and upon the ground that Count No. IV does not state facts sufficient to constitute a crime;

WHEREUPON, the Court denied and overruled said objection and the defendant asked and was allowed an exception to said ruling;

WHEREAS, over the said objections and the said exceptions, the Government then offered testimony which was received and which tended to prove that on January 3, 1919, in the house occupied by the said Guiseppi Pinasco, on the premises described as the "Prato Gardens," situated one-fourth mile north of the Duwamish River and about ten rods west of the Pacific Highway, in the Northern Division of the Western District of Washington, the defendant, Guiseppi Pinasco, did carry on the business of a distiller without having given a bond of a distiller; that the said defendant on January 3, 1919, in the house occupied by him on the premises described as the "Prato Gardens," situated one-fourth mile north of the Duwamish River and about ten rods west of the Pacific Highway, in the Northern Division of the Western District of Washington and within the Internal Revenue Collection District of Washington, being then and there engaged in and intending to be engaged in the business of a distiller, did then and there fail to give notice in writing to the Collector of Internal Revenue, for the collection district aforesaid; that on the third day of January, 1919, in the house occupied by the said Guiseppi Pinasco, on the premises described as the "Prato Gardens," situated

one-fourth mile north of the [25] Duwamish River and about ten rods west of the Pacific Highway, in the Northern Division of the Western District of Washington, and within the Internal Revenue Collection District of Washington, the said defendant, Guiseppi Pinasco, did make and ferment a certain mash fit for distillation, to wit, forty gallons of raisin mash, in a certain building, to wit, the dwelling-house of the said defendant, said house not then and there being an authorized distillery; that the defendant, Guiseppi Pinasco, on the 3d day of January, 1919, in the house occupied by the said Guiseppi Pinasco, on the premises described as the "Prato Gardens," situated one-fourth mile north of the Duwamish River and about ten rods west of the Pacific Highway, in the Northern Division of the Western District of Washington, and within the Internal Revenue Collection District of Washington, did use a certain still for the purpose of distilling in a certain dwelling-house there situated;

WHEREUPON, the Goverment rested.

WHEREUPON, the defendant moved the Court for an order instructing and directing the jury to return a verdict of not guilty as to Count One of the Indictment upon the ground and for the reason that the Indictment does not state facts sufficient to constitute a crime, and that there is not sufficient evidence to warrant a conviction under said Count One of said Indictment;

WHEREUPON, the Court overruled said objection, and denied said motion, and refused to give said instruction, to which ruling the defendant then and

there asked and was allowed an exception;

WHEREUPON, the defendant moved the Court for [26] an order instructing and directing the jury to return a verdict of not guilty as to Count II of the Indictment upon the ground and for the reason that the Indictment does not state facts sufficient to constitute a crime, and that there is not sufficient evidence to warrant a conviction under said Count Two of said Indictment;

WHEREUPON, the Court overruled said objection, and denied said motion, and refused to give said instruction, to which ruling the defendant then and there asked and was allowed an exception;

WHEREUPON, the defendant moved the Court for an order instructing and directing the jury to return a verdict of not guilty as to Count III of the Indictment upon the ground and for the reason that the Indictment does not state facts sufficient to constitute a crime, and that there is not sufficient evidence to warrant a conviction under said Court III of said Indictment;

WHEREUPON, the Court overruled said objection, and denied said motion, and refused to give said instruction, to which ruling the defendant then and there asked and was allowed an exception;

WHEREUPON, the defendant moved the Court for an order instructing and directing the jury to return a verdict of not guilty as to Count IV of the Indictment upon the ground and for the reason that the Indictment does not state facts sufficient to constitute a crime, and that there is not sufficient evi-

dence to warrant a conviction under said Count IV of said Indictment;

WHEREUPON, the Court overruled said objection, and denied said motion, and refused to give said [27] instruction, to which ruling the defendant then and there asked and was allowed an exception;

WHEREUPON, the defendant moved the Court to instruct the jury to return a verdict of not guilty upon Counts I, II, III and IV of the Indictment, upon the ground and for the reason that none of them, either taken separately or all together, state facts sufficient to constitute a crime, and that there is no fact proven sufficient to carry the case to the jury on all or any of said counts of said Indictment, and the defendant entitled to an affirmative instruction to the jury of not guilty;

WHEREUPON, the Court overruled said motion, and denied said request, and refused to give said instruction, to which ruling and said order the defendant asked and was allowed an exception;

WHEREUPON, the defendant moved the Court for an order to require the Government to then and there elect whether it should proceed to prosecute upon Count I, Count II, Count III or Count IV of the Indictment, and to require the Government to elect which of said count, or counts, other than the whole number, it shall proceed to prosecute under;

WHEREUPON, the Court refused to grant said motion, and overruled and denied the same, and to this ruling the defendant asked and was allowed an exception;

WHEREUPON, the defendant offered testimony

which was received, and which tended to disprove the allegations of the Indictment and to controvert the proof offered and received on behalf of the Government;

WHEREUPON, both sides rested. [28]

WHEREUPON, the defendant moved the Court to instruct the jury to return a verdict of not guilty upon Count I of the Indictment upon the ground and for the reason that Count I of said Indictment does not state facts sufficient to constitute a crime; that the testimony does not show the defendant to be guilty of any crime, and that there are not sufficient facts to warrant the submission of the cause to the jury;

WHEREUPON, the Court overruled said motion, denied the same, and refused to give said instruction to the jury, and to the ruling of the Court the defendant asked and was allowed an exception;

WHEREUPON, the defendant moved the Court to instruct the jury to return a verdict of not guilty upon Count II of the Indictment upon the ground and for the reason that Count II of said Indictment does not state facts sufficient to constitute a crime; that the testimony does not show the defendant to be guilty of any crime and that there are not sufficient facts to warrant the submission of the cause to the jury;

WHEREUPON, the Court overruled said motion, denied the same, and refused to give said instruction to the jury, and to the ruling of the Court the defendant asked and was allowed an exception;

WHEREUPON, the defendant moved the Court to instruct the jury to return a verdict of not guilty

upon Count III of the Indictment upon the ground and for the reason that Count III of said Indictment does not state facts sufficient to constitute a crime; that the testimony does not show the defendant to be guilty of any crime, and [29] that there are not sufficient facts to warrant the submission of the cause to the jury;

WHEREUPON, the Court overruled said motion, denied the same, and refused to give said instruction to the jury, and to the ruling of the Court the defendant asked and was allowed an exception;

WHEREUPON, the defendant moved the Court to instruct the jury to return a verdict of not guilty upon Count IV of the Indictment upon the ground and for the reason that Count IV of said Indictment does not state facts sufficient to constitute a crime; that the testimony does not show the defendant to be guilty of any crime, and that there are not sufficient facts to warrant the submission of the cause to the jury;

WHEREUPON, the Court overruled said motion, denied the same, and refused to give said instruction to the jury, and to the ruling of the Court the defendant asked and was allowed an exception;

WHEREUPON, the defendant moved the Court to instruct the jury to return a verdict of not guilty upon each and every count of the Indictment, and upon all of them, for the reasons theretofore stated;

WHEREUPON, the Court overruled said motion and denied the same, and refused to give said instruction, and to the ruling of the Court, the defendant asked and was allowed an exception;

WHEREUPON, the Court having instructed the jury, and the jury having retired for deliberation, the jury on May 9, 1919, returned and filed herein a verdict finding the defendant to be guilty on Count No. I, Count No. II, Count No. III and Count No. IV of the Indictment. [30]

I hereby certify that within the time fixed by the ruling of this Court and the stipulation of the respective parties in the within entitled criminal action, the foregoing Bill of Exceptions was duly presented to me for settlement and allowance. It contains all of the material facts in the cause necessary to a full understanding thereof, and

IT IS HEREBY, on this 1st day of July, 1919, SETTLED AND ALLOWED as the Bill of Exceptions in this cause.

Dated this 1st day of July, 1919.

EDWARD E. CUSHMAN,
Judge.

United States of America,
Western District of Washington,—ss.

Due and legal service of the within Bill of Exceptions is admitted this 24th day of June, 1919.

ROBT. C. SAUNDERS,
United States Attorney.

[Indorsed]: Bill of Exceptions. Filed in the United States District Court, Western District of Washington, Northern Division, July 1, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [31]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4593.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPI PINASCO,

Defendant.

Petition for a Writ of Error.

To the Above-entitled Court and to the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court aforesaid:

Now comes the above-named defendant, Guiseppi Pinasco, and by his attorneys, Tucker & Hyland and George H. Rummens, respectfully shows:

That heretofore and on the 9th day of May, 1919, a jury in the above-entitled court and cause returned and filed herein a verdict finding the above-named defendant guilty upon Counts I, II, III and IV of an Indictment, theretofore filed in the above-entitled court and cause against the defendant herein, on the 14th day of March, 1919; that thereafter and on the 16th day of June, 1919, the defendant was, by the order and sentence of the above-entitled court and in said cause, sentenced to pay a fine of One Hundred Dollars and to serve a term of thirty days in the King County Jail on Count I of said Indictment; to pay a fine of One Hundred Dollars on Count II of said Indictment; and to serve a term of six months in said

King County Jail on Count IV of said Indictment, [32] said sentence to run concurrently with the sentence pronounced as aforesaid upon said Count I of said Indictment;

Your petitioner herein, the above-named defendant, feeling himself aggrieved by the said verdict, the said judgment and the said sentence of the Court, entered herein as aforesaid, and by the orders and rulings of said Court and proceedings therein, now herewith petitions this Court for an order allowing him to prosecute a writ of error from said judgment and sentence to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States and in accordance with the procedure of said Court in such cases made and provided; to the end that the said proceedings as herein recited and as more fully set forth in the assignments of error presented herewith may be reviewed, and the manifest error appearing upon the face of the record of said proceedings may be by said Circuit Court of Appeals corrected; and that for said purposes a writ of error and citation thereon should issue as by the law and the ruling of the Court is provided;

Whereupon, the premises considered, your petitioner prays that a writ of error do issue; to the end that the said proceedings of the United States District Court for the said Western District of Washington may be reviewed and corrected, the said errors in said record being herewith assigned and presented herewith; that pending the final determination of said writ of error by said Appellate

Court, an order be made and entered herein that all further proceedings shall be suspended and stayed until the determination of said writ of error by said [33] Circuit Court of Appeals.

WILMON TUCKER and
GEO. H. RUMMENS,
Attorneys for the Petitioner, the Plaintiff in Error.

The writ of error is granted on this, the 1st day of July, 1919, a supersedeas bond having been fixed by the Court in the sum of Two Thousand Dollars, which has been given, filed herein and in all things approved.

EDWARD E. CUSHMAN,
Judge.

United States of America,
Western District of Washington,—ss.

Due and legal service of the within Petition for a Writ of Error is admitted this 24th day of June, 1919.

ROBT. C. SAUNDERS,
United States Attorney.

[Indorsed]: Petition for a Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. June 24, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [34]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4593.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPI PINASCO,

Defendant.

Assignments of Error.

Comes now the above-named defendant, Guiseppi Pinasco, and in connection with his petition for a writ of error in this cause, submitted and filed herein and herewith, assigns the following errors which the defendant avers and says occurred at the trial of the above-entitled cause, in the above-entitled court, during the proceedings had therein and upon which he relies to reverse, set aside and correct the judgment and sentence entered herein, and says that there is manifest error appearing upon the face of the record in this:

I.

That the Court erred in overruling the demurrer of the defendant to Count No. I of said Indictment and in not sustaining said demurrer to said Count I of said Indictment.

II.

That the Court erred in overruling the demurrer of the defendant to Count No. II of said Indictment

and in not sustaining said demurrer to said Count II of said Indictment. [35]

III.

That the Court erred in overruling the demurrer of the defendant to Count No. III of said Indictment and in not sustaining said demurrer to said Count III of said Indictment.

IV.

That the Court erred in overruling the demurrer of the defendant to Count No. IV of said Indictment and in not sustaining said demurrer to said Count IV of said Indictment.

V.

That the Court erred in overruling the demurrer of the defendant to said Indictment and in holding the defendant to trial on account thereof.

VI.

That the Court erred in overruling and in not sustaining the amended motion to quash the first count of said Indictment for the reasons that said count is indefinite, uncertain, insufficient in law, and does not state specific or sufficient facts in law to constitute a crime or offense against the Government of the United States or the laws thereof; that the Act of Congress under which said offense is sought to be charged had, prior to the alleged commission of said offense and the return of said Indictment and the filing thereof, been by the Congress of the United States repealed both expressly and by implication.

VII.

That the Court erred in overruling and in not sustaining the amended motion to quash the second

count of said Indictment for the reasons that said count is [36] indefinite, uncertain, insufficient in law, and does not state specific or sufficient facts in law to constitute a crime or offense against the Government of the United States or the laws thereof; that the Act of Congress under which said offense is sought to be charged had, prior to the alleged commission of said offense and the return of said Indictment and the filing thereof, been by the Congress of the United States repealed both expressly and by implication.

VIII.

That the Court erred in overruling and in not sustaining the amended motion to quash the third count of said Indictment for the reasons that said count is indefinite, uncertain, insufficient in law, and does not state specific or sufficient facts in law to constitute a crime or offense against the Government of the United States or the laws thereof; that the Act of Congress under which said offense is sought to be charged had, prior to the alleged commission of said offense and the return of said Indictment and the filing thereof, been by the Congress of the United States repealed both expressly and by implication.

IX.

That the Court erred in overruling and in not sustaining the amended motion to quash the fourth count of said Indictment for the reasons that said count is indefinite, uncertain, insufficient in law, and does not state specific or sufficient facts in law to constitute a crime or offense against the Government of the United States or the laws thereof; that the Act

of Congress under which said offense is sought to be charged had, prior to the alleged commission of said offense and the return of said Indictment and the filing thereof, been by the Congress of the United [37] States repealed both expressly and by implication.

X.

That the Court erred in overruling the amended motion of the defendant to quash the whole of said Indictment in its entirety on the ground and for the reason that there was then and there pending in the United States District Court for the Western District of Washington, Northern Division, a proceeding then and there entitled: "United States of America, Libelant, vs. One Machine for Corking Bottles, One Blow-torch, One Remington 12-guage repeating Shotgun of Slide Action, Two 50-Pound Boxes of Buena Fruita Brand Dried Raisins, Two Copper Kettles, One Rubber Hose, Eleven Hundred Dollars in Currency, One Cashier's Check for $600.00 unendorsed, One One-man Cross-cut Saw, One Copper Still, Twenty-gallon Capacity, Together with Still, Cap and Coil Complete," being No. 4537, said proceeding being a proceeding of condemnation of property of the defendant, Guiseppi Pinasco, for the same offense charged and set forth in each of the counts in said Indictment herein; and reference is hereby expressly made to the files, records and proceedings in the office of the clerk of said court for certainty, and this motion was based and this assignment predicated upon the said files, records and proceedings in said cause and upon the proceedings in

the above-entitled criminal action.

XI.

That the Court erred in making and entering its order herein prior to the reception of any testimony upon the part of the Government in overruling the motion of the defendant to require the Government to elect the ground and cause upon which the Government would proceed to trial; [38] that the Government should be required to elect and say whether it would then proceed with and try the defendant under the Indictment in said cause, or whether it would proceed with and try the proceeding pending in the above-entitled court and cause, known as Cause No. 4537, entitled: "United States of America, Libelant, vs. One Machine for Corking Bottles, etc."

XII.

That the Court erred, immediately prior to the introduction of any testimony upon the part of the Government, in overruling the objection of the defendant to the introduction of any testimony on the part of the Government in relation to Count No. 1 of said Indictment for the reason and upon the ground that said Count I does not state facts sufficient to constitute a crime.

XIII.

That the Court erred, immediately prior to the introduction of any testimony upon the part of the Government, in overruling the objection of the defendant to the introduction of any testimony on the part of the Government in relation to Count No. II of said Indictment for the reason and upon the

ground that said Count II does not state facts sufficient to constitute a crime.

XIV.

That the Court erred in, immediately prior to the introduction of any testimony upon the part of the Government, overruling the objection of the defendant to the introduction of any testimony on the part of the Government in relation to Count No. III of said Indictment for the reason and upon the ground that said Count III does not state facts sufficient to constitute a crime. [39]

XV.

That the Court erred in, immediately prior to the introduction of any testimony upon the part of the Government, overruling the objection of the defendant to the introduction of any testimony on the part of the Government in relation to Count No. IV of said Indictment for the reason and upon the ground that said Count IV does not state facts sufficient to constitute a crime.

XVI.

That at the conclusion of the evidence of the Government, the Court erred in overruling the motion of the defendant that the Court should then and there instruct the jury to return a verdict of not guilty as to Count I of the Indictment for the reason and upon the ground that said Count I does not state facts sufficient to constitute a crime, and that there is not sufficient evidence to warrant a conviction thereon.

XVII.

That at the conclusion of the evidence of the Government, the Court erred in overruling the motion of

the defendant that the Court should then and there instruct the jury to return a verdict of not guilty as to Count I of the Indictment for the reason and upon upon the ground that said Count II does not state facts sufficient to constitute a crime, and that there is not sufficient evidence to warrant a conviction thereon.

XVIII.

That at the conclusion of the evidence of the Government, the Court erred in overruling the motion of the defendant that the Court should then and there instruct the jury to return a verdict of not guilty as to Count III **[40]** of the Indictment for the reason and upon the ground that said Count III does not state facts sufficient to constitute a crime, and that there is not sufficient evidence to warrant a conviction thereon.

XIX.

That at the conclusion of the evidence of the Government, the Court erred in overruling the motion of the defendant that the Court should then and there instruct the jury to return a verdict of not guilty as to Count IV of the Indictment for the reason and upon the ground that said Count IV does not state facts sufficient to constitute a crime, and that there is not sufficient evidence to warrant a conviction thereon.

XX.

That at the conclusion of all of the testimony offered on behalf of both the Government and the defendant, the Court erred in overruling the motion of the defendant to instruct the jury to return a verdict of not guilty upon Count II of the Indictment upon

the ground and for the reason that Count I of the Indictment does not state facts sufficient to constitute a crime, and that the testimony does not show the defendant to be guilty of any crime.

XXI.

That at the conclusion of all of the testimony offered on behalf of both the Government and the defendant, the Court erred in overruling the motion of the defendant to instruct the jury to return a verdict of not guilty upon Count II of the Indictment upon the ground and for the reason that Count II of the Indictment does not state facts sufficient to constitute a crime, and that the [41] testimony does not show the defendant to be guilty of any crime.

XXII.

That at the conclusion of all of the testimony offered on behalf of both the Government and the defendant, the Court erred in overruling the motion of the defendant to instruct the jury to return a verdict of not guilty upon Count III of the Indictment upon the ground and for the reason that Count III of the Indictment does not state facts sufficient to constitute a crime, and that the testimony does not show the defendant to be guilty of any crime.

XXIII.

That at the conclusion of all of the testimony offered on behalf of both the Government and the defendant, the Court erred in overruling the motion of the defendant to instruct the jury to return a verdict of not guilty upon Count IV of the Indictment upon the ground and for the reason that Count IV of the Indictment does not state facts sufficient to constitute

a crime, and that the testimony does not show the defendant to be guilty of any crime.

XXIV.

That the Court erred in overruling the motion interposed by the defendant in arrest of judgment on the Indictment herein upon which the defendant was convicted and upon each and every count thereof, upon the ground and for the reason that the facts therein stated do not constitute a crime or offense against the laws of the United States.

XXV.

That the Court erred in sentencing the defendant [42] upon Count I of the Indictment.

XXVI.

That the Court erred in sentencing the defendant upon Count II of the Indictment.

XXVII.

That the Court erred in sentencing the defendant upon Count IV of the Indictment.

And as to each, every and all of said assignments of error, the defendant says that at the time of the making of the order, or ruling of the Court complained of, the defendant duly asked and was allowed an exception to the ruling and the order of the Court.

WILMON TUCKER and
GEO. H. RUMMENS,

Attorneys for the Defendant Herein, the Plaintiff in Error.

United States of America,
Western District of Washington,—ss.

Due and legal service of the within Assignments of

Error is admitted this 24th day of June, 1919.

ROBT. C. SAUNDERS,
United States Attorney.

[Indorsed]: Assignments of Error. Filed in the United States District Court, Western District of Washington, Northern Division. June 24, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [43]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4593.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUISEPPI PINASCO,
Defendant.

Praecipe for Transcript of Record.

To the Clerk of the United States District Court for the Western District of Washington, Northern Division:

In making up the record in the above-entitled cause for the United States Circuit Court of Appeals, you are directed to include in the Transcript the following documents:

1. The indictment.
2. ~~The demurrer.~~
3. ~~The order of the Court overruling the demurrer.~~

4. The amended motion to quash the indictment.
5. The order of the Court overruling this motion.
6. The journal entry showing the plea of not guilty.
7. The motion to require the Government to elect.
8. The order of the Court denying said motion.
9. The journal entry of the Court showing the record of the first day's proceedings at the trial, showing that the jury was impaneled. [44]
10. The journal entry showing the return of the verdict with a copy of said verdict as filed.
11. The motion in arrest of judgment.
12. The order of the Court denying said motion.
13. The judgment and sentence of the Court.
14. The order of the Court fixing the appeal and supersedeas bond.
15. The appeal bond and supersedeas bond.
16. The bill of exceptions.
17. The petition for a writ of error with order allowing the writ endorsed thereon.
18. The assignments of error.
19. The writ of error.
20. The citation on the writ of error.
21. The acceptance of service of the citation.
22. The clerk's certificate.
23. This praecipe.

Dated at Seattle, Washington, this third day of July, 1919.

WILMON TUCKER and
GEO. H. RUMMENS,
Attorneys for the Defendant.

Service of the above praecipe is hereby accepted this 3d day of July, 1919.

ROBT. C. SAUNDERS,
By CHARLOTTE KOLMITZ,
Asst. U. S. Atty.,
United States District Attorney for the Western District of Washington, Northern Division. [45]

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this court.

WILMON TUCKER,
GEORGE H. RUMMENS,
For Plaintiff in Error.

[Indorsed]: Praecipe. Filed in the United States District Court, Western District of Washington, Northern Division. July 3, 1919. F. M. Harshberger, Clerk. By S. E. Leitch Deputy. [46]

United States District Court, Western District of Washington, Northern Division.

No. 4593.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUISEPPE PINASCO,
Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this typewritten transcript of record consisting of pages numbered from 1 to 46, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [47]

Clerk's fee (Sec. 828, R. S. U. S.), for making record, certificate or return, 93 folios at 15¢........................$13.95
Certificate of Clerk to transcript of record—4 folios at 15¢........................ .60
Seal to said Certificate........................ .20

I hereby certify that the above cost for preparing and certifying record amounting to $14.75 has been paid to me by attorneys for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 30th day of July, 1919.

[Seal] F. M. HARSHBERGER,

Clerk United States District Court. [48]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 4593.

GUISEPPI PINASCO,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States of America to the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the Western District of Washington, Northern Division, and to said Court, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment and sentence in the

District Court of the United States for the Western District of Washington, Northern Division, in a cause pending therein, wherein the United States of America was plaintiff and Guiseppi Pinasco was defendant, a manifest error happened and occurred to the damage of the said Guiseppi Pinasco, the above-named plaintiff in error, as by his petition and complaint doth appear, and we being willing that error, if any there hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you that under your seal you send the record and proceedings aforesaid, with all things concerning the same and [49] pertaining thereto, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you may have the same at San Francisco, California, where said court is sitting, within thirty days of the date hereof, in the said Circuit Court of Appeals to be then and there held, and the records and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct the error what of right, and according to the law and the custom of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, the Chief Justice of the United States, this the 1st day of July, 1919.

[Seal] F. M. HARSHBERGER,

Clerk.

By S. E. Leitch,

Deputy.

Allowed this the 1st day of July, 1919.

EDWARD E. CUSHMAN,
United States Judge.

Received a copy of the within Writ of Error this 1st day of July, 1919.

ROBT. C. SAUNDERS,
Attorney for United States. **[50]**

[Endorsed]: Original. In the United States Circuit Court of Appeals for the Ninth Circuit. Guiseppi Pinasco, Plaintiff in Error vs. The United States of America, Defendant in Error. No. ——. Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 1, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. **[51]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4593.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

GUISEPPI PINASCO,
Defendant and Plaintiff in Error.

Citation.

To the United States of America and to ROBERT C. SAUNDERS, United States District Attorney, in the Western District of Washington:

You are hereby cited and admonished to be and

appear in the United States Circuit Court of Appeals, for the Ninth Circuit to be held in the city of San Francisco, State of California, on the 1st day of August, 1919, pursuant to an order allowing a writ of error, filed and entered in the Clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, on a final judgment and sentence signed, filed and entered on the 16th day of June, 1919, in a certain action and cause, being No. 4593, and entitled, "The United States of America vs. Guiseppi Pinasco," to show cause, if any there be, why the judgment and sentence against the said Guiseppi Pinasco, the plaintiff in error herein, as in said order allowing the said writ mentioned doth appear, should not be corrected, and why justice should not be done [52] in the premises.

WITNESS the Honorable EDWARD E. CUSHMAN, District Judge for the Western District of Washington, Northern Division this 1st day of July, 1919.

EDWARD E. CUSHMAN,

United States District Judge for Western District of Washington, Northern Division.

[Seal] Attest: F. M. HARSHBERGER,

Clerk.

By S. E. Leitch,

Deputy. [53]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4593.

UNITED STATES OF AMERICA,

Plaintiff and Defendant in Error,

vs.

GUISEPPI PINASCO,

Defendant and Plaintiff in Error.

Acceptance of Service of Citation.

The undersigned, attorney of record for the above-named plaintiff, the defendant in error, hereby admits service of citation and service of the writ of error herein, and hereby enters appearance for the United States of America, in the United States Circuit Court of Appeals, for the Ninth Circuit.

Dated this 1st day of July, 1919.

ROBT. C. SAUNDERS,

Attorney for the United States of America, the Above-named Plaintiff, the Defendant in Error.

[54]

[Endorsed]: Original. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America, Plaintiff and Defendant in Error, vs. Guiseppi Pinasco, Defendant and Plaintiff in Error. No. 4593. Citation. Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 1, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. **[55]**

[Endorsed]: No. 3379. United States Circuit Court of Appeals for the Ninth Circuit. Guiseppi Pinasco, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed August 15, 1919.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the Circuit Court of Appeals for the Ninth Circuit.

No. —— (Not Docketed).

GUISEPPI PINASCO,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Stipulation Fixing Time to File Writ of Error and Citation and Docket Cause.

The plaintiff in error having sued out his writ of error, served the same and the citation on July 1, 1919,—

IT IS STIPULATED, by and between respective counsel, that the plaintiff in error may have and take until August 15, 1919, including all of said day, to file in the Circuit Court of Appeals, for the Ninth

Circuit, at San Francisco, California, the said writ of error, the citation thereon, the transcript of record in said cause, and cause the said case to be docketed.

Dated at Seattle, Washington, this, the 22d day of July, 1919.

Dated San Francisco, Cal., July 25, 1919.

ROBT. C. SAUNDERS,
United States Attorney.
TUCKER & HYLAND,
Attorneys for Plaintiff in Error.

So ordered.

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: No. 3379. In the Circuit Court of Appeals for the Ninth Circuit. Guiseppi Pinasco, Plaintiff in Error, vs. The United States of America, Defendant in Error. Stipulation. Filed Jul. 25, 1919. F. D. Monckton, Clerk. Refiled Aug. 15, 1919. F. D. Monckton, Clerk.

No. 3379.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

GUISEPPI PINASCO,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

WILLIAM R. BELL,
Attorney for Plaintiff in Error,
300 Central Building, Seattle, Washington.

FILED
OCT 1 - 1919
F. D. MONCKTON,
CLERK.

No. 3379.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GUISEPPI PINASCO,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

The plaintiff in error was indicted in the lower court for a violation of several sections of the Internal Revenue Law. In Count I it was charged that he carried on the business of a distiller without having given the bond required by law. In Count II it was charged that he carried on the business of a distiller without having given notice thereof to the Collector of Internal Revenue. In Count III it was charged that he unlawfully made and fermented mash fit for distillation and kept the same in his dwelling-house, which dwelling-house was not a distillery authorized by law. In Count IV it was charged that he used a still for the purpose of distilling in his dwelling-house. (Tr., pp. 2, 3 and 4.) The several counts of the indictment were based upon the same state of

facts. To this Indictment and to the several counts thereof the plaintiff in error interposed a motion to quash on the ground that each count failed to state facts sufficient to constitute an offense against the laws of the United States, and that the law under which the Indictment was framed was repealed by the Act of March 3, 1917, commonly known as the Reed Amendment, and on the further ground that there was then pending in the same court a proceeding entitled United States of America, Libelant, against One Machine for Corking Bottles, etc., No. 4537, for the condemnation of the property of plaintiff in error for the same offense or offenses charged in the Indictment and based upon the same state of facts. This motion to quash, after argument, was overruled by the lower court. (Tr., pp. 5, 6, 7 and 8.)

Thereafter the plaintiff in error interposed a motion to require the Government to elect whether to proceed in the condemnation proceeding or in the criminal case, the case now before this Court. This motion, after argument, was denied and exception taken and allowed. (Tr., pp. 9, 10 and 11.)

Thereafter the case proceeded regularly to trial and at its close the jury returned a verdict of guilty as to each of the counts contained in the Indictment. (Tr., pp. 12, 13 and 14.)

Thereafter a motion in arrest of judgment was interposed and denied and sentence imposed upon the first, second and fourth counts of the Indictment. A writ of error was then sued out and the cause is now before this Court for review. (Tr., pp. 15, 16, 17, 18 and 47.)

ASSIGNMENTS OF ERROR.

1. That the Court erred in overruling the demurrer of the defendant to Count No. I of said Indictment and in not sustaining said demurrer to said Count I of said Indictment.

2. That the Court erred in overruling the demurrer of the defendant to Count No. II of said Indictment and in not sustaining said demurrer to said Count II of said Indictment.

3. That the Court erred in overruling the demurrer of the defendant to Count No. III of said Indictment and in not sustaining said demurrer to said Count III of said Indictment.

4. That the Court erred in overruling the demurrer of the defendant to Count No. IV of said Indictment and in not sustaining said demurrer to said Count IV of said Indictment.

5. That the Court erred in overruling the demurrer of the defendant to said Indictment and in holding the defendant to trial on account thereof.

6. That the Court erred in overruling and in not sustaining the amended motion to quash the first count of said Indictment for the reasons that said count is indefinite, uncertain, insufficient in law, and does not state specific or sufficient facts in law to constitute a crime or offense against the Government of the United States or the laws thereof; that the Act of Congress under which said offense is sought to be charged had, prior to the alleged commission of said offense and

the return of said Indictment and the filing thereof, been by the Congress of the United States repealed both expressly and by implication.

7. That the Court erred in overruling and in not sustaining the amended motion to quash the second count of said Indictment for the reasons that said count is indefinite, uncertain, insufficient in law, and does not state specific or sufficient facts in law to constitute a crime or offense against the Government of the United States or the laws thereof; that the Act of Congress under which said offense is sought to be charged had, prior to the alleged commission of said offense and the return of said Indictment and the filing thereof, been by the Congress of the United States repealed both expressly and by implication.

8. That the Court erred in overruling and in not sustaining the amended motion to quash the third count of said Indictment for the reasons that said count is indefinite, uncertain, insufficient in law, and does not state specific or sufficient facts in law to constitute a crime or offense against the Government of the United States or the laws thereof; that the Act of Congress under which said offense is sought to be charged had, prior to the alleged commission of said offense and the return of said Indictment and the filing thereof, been by the Congress of the United States repealed both expressly and by implication.

9. That the Court erred in overruling and in not sustaining the amended motion to quash the fourth count of said Indictment for the reasons that said count is indefinite, uncertain, insufficient in law, and

does not state specific or sufficient facts in law to constitute a crime or offense against the Government of the United States or the laws thereof; that the Act of Congress under which said offense is sought to be charged had, prior to the alleged commission of said offense and the return of said Indictment and the filing thereof, been by the Congress of the United States repealed both expressly and by implication.

10. That the Court erred in overruling the amended motion of the defendant to quash the whole of said Indictment in its entirety on the ground and for the reason that there was then and there pending in the United States District Court for the Western District of Washington, Northern Division, a proceeding then and there entitled: "United States of America, Libelant, vs. One Machine for Corking Bottles, One Blow-torch, One Remington 12-Gauge Repeating Shotgun of Slide Action, Two 50-Pound Boxes of Buena Fruita Brand Dried Raisins, Two Copper Kettles, One Rubber Hose, Eleven Hundred Dollars in Currency, One Cashier's Check for $600.00 Unendorsed. One One-man Cross-cut Saw, One Copper Still, Cap and Coil Complete," being No. 4537, said proceeding being a proceeding of condemnation of property of the defendant Guiseppi Pinasco, for the same offense charged and set forth in each of the counts in said Indictment herein; and reference is hereby expressly made to the files, records and proceedings in the office of the clerk of said court for uncertainty, and this motion was based and this assignment predicated upon the said files, records and proceedings in

said cause and upon the proceedings in the above-entitled criminal action.

11. That the Court erred in making and entering its order herein prior to the reception of any testimony upon the part of the Government in overruling the motion of the defendant to require the Government to elect the ground and cause upon which the Government would proceed to trial; that the Government should be required to elect and say whether it would then proceed with and try the defendant under the Indictment in said cause, or whether it would proceed with and try the proceeding pending in the above-entitled court and cause, known as Cause No. 4537, entitled "United States of America, Libelant, vs. One Machine for Corking Bottles, etc."

12. That the Court erred, immediately prior to the introduction of any testimony upon the part of the Government, in overruling the objection of the defendant to the introduction of any testimony on the Part of the Government in relation to Count No. I of said Indictment for the reason and upon the ground that said Count I does not state facts sufficient to constitute a crime.

13. That the Court erred, immediately prior to the introduction of any testimony upon the part of the Government, in overruling the objection of the defendant to the introduction of any testimony on the part of the Government in relation to Count No. II of said Indictment for the reason and upon the ground that said Count II does not state facts sufficient to constitute a crime.

14. That the Court erred in, immediately prior to the introduction of any testimony upon the part of the Government, overruling the objection of the defendant to the introduction of any testimony on the part of the Government in relation to Count No. III of said Indictment for the reason and upon the ground that said Count III does not state facts sufficient to constitute a crime.

15. That the Court erred in, immediately prior to the introduction of any testimony upon the part of the Government, overruling the objection of the defendant to the introduction of any testimony on the part of the Government in relation to Count IV of said Indictment for the reason and upon the ground that said Count IV does not state facts sufficient to constitute a crime.

16. That, at the conclusion of the evidence of the Government, the Court erred in overruling the motion of the defendant that the Court should then and there instruct the jury to return a verdict of not guilty as to Count I of the Indictment for the reason and upon the ground that said Count I does not State facts sufficient to constitute a crime, and that there is not sufficient evidence to warrant a conviction thereon.

17. That, at the conclusion of the evidence of the Government, the Court erred in overruling the motion of the defendant that the Court should then and there instruct the jury to return a verdict of not guilty as to Count II of the Indictment for the reason and upon the ground that said Count II does not state facts sufficient to constitute a crime, and that there is not sufficient evidence to warrant a conviction thereon.

18. That, at the conclusion of the evidence of the Government, the Court erred in overruling the motion of the defendant that the Court should then and there instruct the jury to return a verdict of not guilty as to Count III of the Indictment for the reason and upon the ground that said Count III does not state facts sufficient to constitute a crime, and that there is not sufficient evidence to warrant a conviction thereon.

19. That, at the conclusion of the evidence of the Government, the Court erred in overruling the motion of the defendant that the Court should then and there instruct the jury to return a verdict of not guilty as to Count IV of the Indictment for the reason and upon the ground that said Count IV does not state facts sufficient to constitute a crime, and that there is not sufficient evidence to warrant a conviction thereon.

20. That, at the conclusion of all of the testimony offered on behalf of both the Government and the defendant, the Court erred in overruling the motion of the defendant to instruct the jury to return a verdict of not guilty upon Count II of the Indictment upon the ground and for the reason that Count I of the Indictment does not state facts sufficient to constitute a crime, and that the testimony does not show the defendant to be guilty of any crime.

21. That, at the conclusion of all of the testimony offered on behalf of both the Government and the defendant, the Court erred in overruling the motion of the defendant to instruct the jury to return a verdict of not guilty upon Count II of the Indictment upon the ground and for the reason that Count II of the

Indictment does not state facts sufficient to constitute a crime, and that the testimony does not show the defendant to be guilty of any crime.

22. That, at the conclusion of all of the testimony offered on behalf of both the Government and the defendant, the Court erred in overruling the motion of the defendant to instruct the jury to return a verdict of not guilty upon Count III of the Indictment upon the ground and for the reason that Count III of the Indictment does not state facts sufficient to constitute a crime, and that the testimony does not show the defendant to be guilty of any crime.

23. That, at the conclusion of all of the testimony offered on behalf of both the Government and the defendant, the Court erred in overruling the motion of the defendant to instruct the jury to return a verdict of not guilty upon Count IV of the Indictment upon the ground and for the reason that Count IV of the Indictment does not state facts sufficient to constitute a crime, and that the testimony does not show the defendant to be guilty of any crime.

24. That the Court erred in overruling the motion interposed by the defendant in arrest of judgment on the Indictment herein upon which the defendant was convicted and upon each and every count thereof, upon the ground and for the reason that the facts therein stated do not constitute a crime or offense against the laws of the United States.

25. That the Court erred in sentencing the defendant upon Count I of the Indictment.

26. That the Court erred in sentencing the defendant upon Count II of the Indictment.

27. That the Court erred in sentencing the defendant upon Count IV of the Indictment.

ARGUMENT.

I.

The foregoing Assignments of Error will be grouped together for the purpose of argument, for the reason that they are all directed to the insufficiency of the several counts of the Indictment except those relating to the motion to elect, which will be discussed in a separate paragraph. The several counts of the Indictment are based upon alleged infractions of the Internal Revenue Law, and it is the contention of the plaintiff in error that the Internal Revenue Law, and particularly those sections upon which the prosecution in this case is based, have been repealed by later legislation. In the first place, it must be kept in mind that the Internal Revenue Law, so far as it was applicable to the manufacture and sale of distilled liquors, was enacted for the purpose of raising revenue, and although it contained a number of penal clauses and provisions, it has never been regarded in the light of a criminal statute. In *U. S.* v. *Norton,* 91 U. S. 566, this idea is briefly touched upon:

> "The precise question before us came under consideration of Mr. Justice Story in *U. S.* v. *Mayo,* 1 Gall. 397. He held that the phrase 'Revenue Laws' as used in the Act of 1804 meant such laws as are made for the direct and avowed purpose of creating revenue or public funds for

> the service of the government. The same doctrine was reaffirmed by that eminent judge in *U. S.* v. *Cushman,* 3 Sumn. 426. These views commend themselves to the approbation of our judgment."

At the time the Indictment charges the commission of the alleged offenses by the plaintiff in error there was in effect, and for that matter there still is in effect, what is popularly known as the War Time Prohibition measure. Since the enactment of this measure no licenses could be had, no bond could be given for the distillation of intoxicating liquors, and no revenue could be received or collected by the Internal Revenue Department for the sale or distillation of such liquors. In other words, in respect to these matters the Internal Revenue Act was suspended or superseded, and consequently there could be no criminal prosecution for a failure to comply with its requirements. In this connection another suggestion seems to be pertinent. In the year 1915 the State of Washington (Laws of 1915, page 1) enacted a sweeping prohibition measure, which became effective and operative on January 1, 1916. Subsequently the Congress of the United States, under date of March 3, 1917, enacted a law, commonly known as the Reed Amendment, the purpose of which was to enable the State of Washington and other states similarly situated to more effectively enforce its prohibition laws and which impliedly repealed the Internal Revenue Laws as far as the State of Washington was concerned. After the enactment of the Reed Amendment no one in the State of Washington could secure from the

Internal Revenue Department of the United States any license, authority or permission to manufacture or sell intoxicating liquors. The clearly expressed purpose of the Reed Amendment was to aid the several states in the enforcement of their prohibition measures and leave to them prosecution and punishment for all violations or infractions of the liquor laws. It would be a legal absurdity to contend that a man could be punished criminally for failure to secure a license or give a bond for the manufacture or sale of distilled liquors when the law would not permit the receiving of such a bond or the granting of such a license.

II.

After a denial of the motion to quash the indictment, and in due season, the plaintiff in error interposed a motion requiring the plaintiff to elect whether it would proceed to try him under the indictment in the present case or would proceed with and try the proceeding then pending for the condemnation of the property seized by the internal revenue officers at the time of his arrest. Both proceedings were based upon and grew out of the same state of facts, and it was the contention of the plaintiff in error before the lower court and he contends here that the Government could not inaugurate and prosecute the criminal action and the condemnation proceedings at the same time but must elect which one it would prosecute to a finality when a motion was interposed for that purpose. It has long been the settled law of this country that the Government for any infraction of the Internal

Revenue Laws is limited to a choice of one of two proceedings. It may proceed criminally under the penal clauses of the act or it may disregard those penal clauses and proceed in a civil action to collect the penalties or condemn and sell the property of the defendant, but it cannot follow both clauses at the same time. In *U. S.* v. *One Distillery,* 43 Fed. 816, it is held that if an officer and stockholder of a corporation engaged in distilling is convicted for a violation of the Internal Revenue Law, an action cannot be maintained to enforce the forfeiture of the corporation's property for the same offense, even though the forfeiture is resisted only by the other stockholders, and in the opinion it is said:

> "The case of *U. S.* v. *McKee,* 4 Dill. 128, was a civil action brought by the Government to recover the liability denounced by section 3296 of the Revised Statutes of double the amount of taxes of which the United States had been defrauded by the unlawful removal of whisky from the distillery of various persons, in which removals it was charged the defendant aided and abetted. The defendant interposed two defenses, one that he had been theretofore indicted, convicted and punished for the same offenses; two, that those offenses had been pardoned by the President. To that answer the Government demurred. Mr. Justice Miller, with whom concurred Judge Dillon, in overruling the demurrer held that if the specific acts of removal on which the civil suit was brought were the same which were proved in the Indictment, the former conviction and judgment constituted a bar to the civil suit on the ground that our laws forbid that any one shall be twice punished for the same crime or misdemeanor. That case was cited with an apparent

approval by the Supreme Court in *Coffey* v. *United States,* 116 U. S. 445. The circumstance that the civil suit was under one section of the Revised Statutes and the criminal prosecution under another was not considered to affect the question nor is any reason perceived why it should. The decision was based upon the averments that both proceedings were for the same acts or transactions. If the Government cannot be permitted to maintain a civil action for the recovery of money denounced as a penalty for a violation of one of the sections of the statute where the same party had been previously prosecuted, convicted and punished for the same acts and transactions under another section, it would seem for the same reasons to follow necessarily that the Government cannot be permitted to maintain a civil action for the forfeiture of the property of a person for the acts or transactions for which it has previously prosecuted, convicted and punished."

In a later case, *U. S.* v. *Shapleigh,* 54 Fed. Rep. 126, the same doctrine is announced as follows:

"Where provision is made by statute for the punishment of an offense by fine or imprisoment and also for the recovery of a penalty for the same offense by civil suit, a trial and judgment of conviction or acquittal in the criminal proceeding is a bar to the civil suit and a trial and judgment for the plaintiff or defendant in the civil suit is a bar to the criminal proceedings."

In the present instance the criminal proceeding and the civil proceeding were each admittedly based upon the same state of facts. It would seem to follow, therefore, that the Government when seasonably challenged should have been required to elect whether to

proceed with the criminal prosecution or with the civil proceeding to condemn and sell the property of the plaintiff in error.

We submit that the judgment of the lower court should be reversed and this cause remanded with instructions to dismiss the same.

Respectfully submitted,

300 Central Building,
Seattle, Washington.

In the United States Circuit Court of Appeals for the Ninth Circuit

GUISEPPI PINASCO,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 3379

Upon Writ of Error in the United States District Court, for the Western District of Washington, Northern Division.

BRIEF OF DEFENDANT IN ERROR.

ROBERT C. SAUNDERS,
United States Attorney,
CHARLOTTE KOLMITZ,
Assistant United States Attorney,
Attorneys for Defendant in Error.

Metropolitan Press, Seattle

FILED
OCT 1 4 1919
F. D. MONCKTON,
CLERK

In the United States Circuit Court of Appeals for the Ninth Circuit

GUISEPPI PINASCO,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 3379

Upon Writ of Error in the United States District Court, for the Western District of Washington, Northern Division.

BRIEF OF DEFENDANT IN ERROR.

ROBERT C. SAUNDERS,
United States Attorney,
CHARLOTTE KOLMITZ,
Assistant United States Attorney,
Attorneys for Defendant in Error.

I.

At the outset we desire to call this court's attention to the fact that the 1st, 2nd, 3d, 4th and 5th assignments of error need not be considered, as no demurrer is interposed in this case.

The 8th, 14th, 18th and 22nd assignments of error need not be considered, as the motion in arrest of judgment was sustained as to count III of the Indictment on which these assignments of error are based. (Tr. p. 16)

The 25th, 26th and 27th assignments of error will not be considered as no ground or reason for the assignments of error is stated, and said assignments are not touched on in the brief of counsel.

These assignments of error will not be considered in this brief.

II.

The 6th, 7th, and 9th assignments of error are based on the court's ruling in denying the amended motion to quash the Indictment.

The 12th, 13th and 15th assignments of error are based on the court's overruling, immediately prior to the introduction of any testimony and after the first witness had been sworn, the objection of the defendant to the introduction of any testimony on the part of the Government, for the reason that the various counts did not state facts sufficient to constitute a crime.

The practice of attacking an indictment, as not stating an offense, by objection to introduction of evidence, does not prevail in Federal courts, and will not be permitted, except under extraordinary circumstances.

McKnight v. United States, 252 Fed., p. 687.

The 16th, 17th and 19th assignments of error are based on the court's overruling, at the conclusion of the evidence of the Government, of motion of the defendant for an instructed verdict, for the reason that the various counts do not state the facts sufficient to constitute a crime, and for the further reason that there is not sufficient evidence to warrant a conviction. As to the latter ground assigned as error, the appellant's bill of exceptions shows the contrary. (Tr. p. 24.)

The 20th, 21st and 23d assignments of error are based on the court's overruling the motion of defendant for an instructed verdict at the conclusion of all the testimony.

The 24th assignment of error is based on the court's overruling the motion in arrested judgment.

The same general ground of objection runs through all the foregoing assignments of error, enumerated under subdivision II, and they will all be considered together.

The appellant's argument is predicated upon the proposition that the Internal Revenue Statutes have

been repealed by later legislation, and call attention to the War Time Prohibition measure. The particular statute to which the appellant refers is not shown. The case of U. S. v. Schmander, 258 Fed. 251, refers to what is popularly known as the War Time Prohibition Act. I therefore will assume that counsel referred to the same statute as is discussed, 258 Fed. 251 supra, more accurately known as the Act of November 21, 1918. This Act cannot be urged on this appeal as repealing the Internal Revenue Statutes, for the reason that the Act of November 21, 1918, did not go into effect until July 1, 1919, which was subsequent to the commission of the crime in this case, which was January 3, 1919. (Tr. p. 24).

Granted for the sake of argument that the War Time Prohibition Measure above referred to was in effect at the time of the commission of the crime, it cannot be said that the Internal Revenue Statutes are repealed, for the reason that the purpose and substance of the acts are vastly different. The War Time Prohibition Act makes it an offense to sell distilled or malt liquors and to make malt liquors, whereas the Internal Revenue Statutes in question make it an offense to carry on business of a distiller without giving a bond; to carry on the business of a distiller without giving notice to the Internal Revenue Department of intention to do so,

and with using a still for the purpose of distilling in a dwelling house. (Secs. 3258, 3259 and 3266, R. S.)

There is no authority for the statement of counsel that no license could be had or no bond given for the distillation of intoxicating liquors since the Prohibition Act went into effect. The contention rests solely upon the counsel's assertion. Of course it cannot be contended that the State liquor laws referred to in counsel's brief repealed or modified the Federal laws. Nor can it be contended that the Reed Amendment either modified or repealed the statutes upon which the indictment herein is based. The Reed Amendment deals exclusively with the subject of interstate commerce and prohibits the shipment of intoxicating liquors into dry territory. Neither of these laws even touch the field covered by the Internal Revenue Act, and cannot by any stretch or implication be held either to repeal or modify that Act.

The License Tax cases, 72 U. S. 462; 18 Law Ed. 497, effectually dispose of counsel's whole contention, and both the legislative and judicial branches of the Federal Government, and the State Prohibition and Federal Internal Revenue Act could exist side by side as was said. The State law in no way interferes with the authority of Congress. On the contrary, when Congress exercises its authority in a matter within its control, State laws must give way in view of the regulation

of the subject matter by the superior power conferred by the Constitution.

U. S. v. Dan Hill, 248 U. S. p. 420.

While the primary purpose of the Internal Revenue Act is to raise revenue, it is also properly used as an addition to the State and to the Federal legislation in dealing with intoxicating liquors. It is obviously in the policy of the Government to leave no twilight zone, and to restrict the intoxicating liquor business in every manner possible.

In re Charge to the Grand Jury;

162 Fed. 736, 739

U. S. v. Doremus, 249 U. S. p. 86 and cases cited therein.

III.

As to the 10th assignment of error, there is nothing in the transcript or brief to show the nature of the status of the action and no final adjudication is shown; in fact, it is stated that the action is pending. We submit that the 10th assignment is too indefinite and vague to be considered by this court. And there are no authorities which go to the extent of holding that mere pendency of a civil action is a bar to a criminal action or that the mere pendency of a criminal action is a bar to a civil action.

As to the 11th assignment of error, the same objection might be made that the authorities do not go to the extent of requiring an election. If, however, counsel's theory of election is correct, then the defendant is not prejudiced, for the Government has virtually elected to try the criminal case first by proceeding to conviction and sentence in the criminal case. If the termination of one suit is a bar to the other, the question should properly be raised at the termination of one action or the other; or, in this case, in the civil case, at the termination of this criminal action.

There is nothing in the record to show that the offense charged in the civil suit is the same as stated by counsel in his brief, nor are the facts upon which the Government would hope to procure a judgment in the civil case identical with those in the criminal case.

Granted for the sake of argument that one case has been concluded, the weight of authority is in line with the Government's contention. The case of United States v. Three Copper Stills, 47 Fed. 495, holds that, one who has been convicted for illicit distilling is estopped to claim as his own the distillery forfeited thereby, and such a conviction is not a bar to a proceeding in rem to prevent the forfeiture. (This case distinguishes the case of U. S. v. McKee, 4 Dill 128, and the case of Coffey v. U. S. 116 U. S. 436, cited by counsel.)

The Palmyra, 12 Wheat, 14.

The proceedings in rem for forfeiture stand independent of, and wholly unaffected by any criminal proceeding in personam and vice versa.

U. S. v. Olsen, 57 Fed. 579;

(Distinguished U. S. vs. McKee, supra, U. S. v. Coffey, supra, and U. S. v. One Distillery, 43 Fed. 816)

U. S. v. Stone, 64 Fed. 667,

(Distinguishes Coffey case, supra)

U. S. v. Jaedicke, 73 Fed. 100,

(Distinguishes the Coffey case, supra)

23 Op. Attorney General, 63 (Brief 1900)

Wood v. U. S. 204 Fed. 55

Origet v. U. S. 125 U. S. 240.

The quotation in counsel's brief taken from U. S. v. Shapleigh, 54 Fed. 126, is obiter dicta, and not in line with the weight of authority.

Respectfully submitted,

Robert C. Saunders,

United States Attorney,

Charlotte Kolmitz,

Assistant United States Attorney,

Attorneys for Defendant in Error.